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A COMPENDIUM

OF THE

Law and Practice

OF

VENDORS AND PURCHASERS

OF

REAL ESTATE.

BY J. HENRY DART,

OF LINCOLN'S INN, ESQ., BARRISTER-AT-LAW.

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PREFACE.

THE object proposed by the author of the following pages has been to produce a work which, without being a mere elementary outline on the one hand, or a mere index of cases on the other, may supply the student with a concise and connected statement of the present law and practice affecting vendors and purchasers of real estate, and the practitioner with a portable book of reference to the recent, and the most important early authorities on the subject.

The general arrangement is, so far as practicable, chronological : considering in regular order the several points which present themselves to notice in cases where an ordinary contract is completed, in the usual way, without litigation actual or threatened ; and then discussing, under separate heads, the remedies of either party or his representatives, in cases where the opposite party refuses, neglects, or is unable to perform his agreement ; and also the variations consequent on the sale being under a decree of the Court of Chancery. This order is believed to be best adapted to secure attention and aid the memory, and therefore the easiest for purposes of reference.

The establishment of a General Register will, of course, *eventually* effect considerable changes in the law and practice of sales ; but inasmuch as *no* part of the present system would become wholly obsolete until many years after such a plan had received

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the assent of the Legislature, it has not been considered necessary or expedient to delay the publication of the present work. Should, however, a Register Act be passed in the approaching session, the author proposes to publish, by way of supplement, some remarks upon the general provisions and apparent effect of the enactment.

In conclusion, he cannot but express a hope that the following pages may be found to be of practical utility. That a treatise of this description was wanting, has, he believes, been long the opinion of many members of the profession; among whom, as an authority, he may name the late Mr. *Duval*, upon whose expressed opinion to that effect, and in whose lifetime, the present work was in fact undertaken. The author's professional engagements, however, have extended its preparation over a longer period than its moderate bulk would, perhaps, seem to require: the task, moreover, having, in itself, been one of considerable labour, as he has examined, and endeavoured to form an independent opinion upon the applicability of, every authority cited: defects, however, he is fully sensible, must and do exist; many of which an undivided attention might possibly have removed; but in submitting the volume to the Profession, he has at least the satisfactory assurance that the most able are also in general the most candid and lenient critics.

20, Southampton Buildings,
Chancery Lane,
1st January, 1851.

[See Addenda and Errata after Table of Cases.]

CONTENTS.



CHAPTER I.

AS TO RESTRICTIONS ON THE GENERAL CAPACITY TO BUY OR SELL REAL ESTATE.

1. *Who are generally incompetent to sell*, page 1.

Infants, 2—lunatics, 3—married women, 5—traitors, felons, bankrupts and insolvents, 6.

2. *Who are relatively incompetent to sell*, p. 7.

Persons having no transferable title, 7—or standing in special relation to proposed purchaser which secures undue personal influence, *ib.*

3. *Who are generally incompetent to purchase*, p. 8.

Corporations, except by license, &c., 8—unincorporated classes, *ib.*—aliens, recent and present law respecting, 8 to 10—infants, 10—lunatics, 12—married women, *ib.*—Roman Catholics, before 10th Geo. IV. c. 7, 13—traitors and felons, *ib.*—bankrupts and insolvents, *ib.*, 14.

4. *Who are relatively incompetent to purchase*, p. 15.

Persons filling fiduciary character, 15—cases in which general rule applies, 15 to 19—incompetent purchaser bound at option of parties, interested, 19—cases in which general rule does not apply, or is relaxed, &c., 19 to 22—nature of risk incurred by fiduciary purchaser, 22 to 25—what time allowed for impeaching sale, 25—confirmation and acquiescence by *cestuis que trust*, 26.

CHAPTER II.

AS TO SALES BY FIDUCIARY VENDORS.

1. *As to the time for sale*, p. 27.

By agents, 27—assignees of bankrupts and insolvents, 28—mortgagees, *ib.*—statutory owners, *ib.*—trustees, 28 to 31.

2. *As to the manner of sale*, p. 31.

Whether by auction or private contract, 31, 32—together, or in parcels, 32.

33—precautions to secure advantageous sale, 33, 34—sale with consent, what consent sufficient, 34.

3. *As to the price*, p. 35.

Must be a gross sum, 35—reserved biddings, *ib.*—opening biddings in bankruptcy, 36—no liability on sale by auction below value, *ib.*—price on sales under Land Clauses Consolidation Act, *ib.*—rescinding contract, 37.

4. *General points relating to sales by fiduciary vendors*, p. 37.

General liability, 37—sales by, seldom restrained, 38—liability of person assuming to act as trustee, *ib.*

CHAPTER III.

AS TO THE RELATIVE DUTIES OF VENDORS AND PURCHASERS PRIOR TO THE SALE.

1. *As to the disclosure or concealment of defects, incumbrances, &c., by vendor*, p. 39.

Vendor need not point out patent defect, 39—but must not conceal it, 40—sale by agent, *ib.*—must in Equity disclose latent defect, *ib.*—must fully disclose title, 41—but need not point out defects or matters of which purchaser has notice, *ib.*—lease is notice, *ib.*—what facts to be disclosed as material, *ib.*—inquiry of incumbrancers and trustees, &c., 42.

2. *As to commendatory statements, &c., by vendor*, p. 43.

Puffing statements, 43—What mis-statement fatal at Law and in Equity, 44, 45—stranger when liable for, *ib.*—guarantee of solvency, 46.

3. *As to concealment, &c., of advantages by purchaser*, p. 46.

He need not disclose concealed advantage, 46—but must not mislead vendor, *ib.*—must disclose fact increasing vendor's interest, *ib.*

4. *As to depreciatory remarks, &c., by purchaser*, p. 46.

Purchaser depreciating property cannot sue in Equity, 46—whether liable to action, *ib.*—agreement with, not to bid against, legal, 47.

CHAPTER IV.

AS TO THE PARTICULARS AND CONDITIONS OF SALE.

1. *General matters relating thereto and their construction*, p. 48.

Construed strictly against vendor, but not so as to contravene Law or Custom, 48—purchaser when bound by catching conditions, 49—particulars, &c., cannot be contradicted, &c., by parol, except on behalf of defendant in Equity, 50—alteration of printed particulars, *ib.*—sale without reserve, 51.

2. *As to the preparation and contents of particulars*, p. 51.

Description of property, 51—what estate and advantages implied, *ib.*—minerals when not included, 52—permanent charges, &c., to be stated, *ib.*—unless purchaser has notice, 53—but there must be no misrepresentation, &c., *ib.*, 54—removal of buildings when to be stated, *ib.*—reference to plan, 55—showing intended improvements, *ib.*—adjoining land described as building land, *ib.*—meaning of particular descriptive expressions, 56.

3. *As to the conditions*, p. 57.

Against retracting biddings, 57—for reserved biddings, *ib.*—as to the deposit, *ib.*—abstract, 57, 58—time for completion, and interest, 58 to 60—conveyance, 60—apportionment of rent, *ib.*—crops, fixtures, and timber, 61—misdescriptions and compensation, 62 to 65—deeds, attested copies, &c., 65, 66—title, &c., 66 to 68—identity, 69—expenses, 70—indemnity, *ib.*—time for objections, 70 to 72—resale and forfeiture of deposit, 73—facts stated in, must be proved, *ib.*

4. *What special conditions are generally requisite in various specified cases*, p. 74.

On sale of inclosed lands, 74—lands formerly waste, *ib.*—enfranchised copyholds, *ib.*—copyholds late waste, 75—leaseholds, *ib.*—renewable leaseholds, 76—reversions, *ib.*

5. *General remarks on special conditions*, p. 76.

Use of, by fiduciary vendors, 76, 77—expenses on sale in lots, 77—power to sell under, 78—misdescriptions, *ib.*—covenants, *ib.*

CHAPTER V.

THE SALE AND MATTERS CONNECTED THEREWITH.

1. *Auction, what it is*, p. 80.

Defined, 80—express direction to sell by, *ib.*

2. *The auctioneer, his liabilities, power, and remuneration*, p. 80.

When liable as principal, 80—cannot vary terms after sale, *ib.*—his power, rights, and liabilities as respects deposit, 81—commission, 82—insolvent, vendor bears loss, *ib.*—agent for parties within Statute of Frauds, *ib.*—revocation of his authority, 83—whether signing as agent he can sue principal, *ib.*

3. *Agents*, p. 83.

How appointed, 83—private instructions to, 84—apparent agent, *ib.*—purchaser, how bound by acts of, *ib.*—agency denied, *ib.*—contract by agent, nominally as principal, or by nominal agent, 85—contract by, how to be signed, *ib.*—of undisclosed principal, 86—has no implied power to receive purchase-

money, *ib.*—order to, to pay it over, *ib.*—commission, *ib.*—authority of, may be revoked, *ib.*—or unauthorized acts adopted, when, *ib.*

4. *The deposit*, p. 87.

Its nature, 87—how to be paid, *ib.*—cheque for, 88—investment, *ib.*—forfeiture, *ib.*—retainer by vendor, *ib.*—loss, 89.

5. *Puffers and reserved biddings*, p. 89.

One bidder allowed in Equity, when, 89—not at law, *semble*, *ib.*—purchasing by mistake, 90.

CHAPTER VI.

AS TO THE AGREEMENT.

1. *General necessity for a written agreement*, p. 91.

Statute of Frauds, 91—what sales not within, *ib.*—parol agreement for lease &c., void, *ib.*—parol license, 92—agreement substantially for sale, *ib.*—void agreement may excuse trespass, 93—written transfer of parol agreement, *ib.*—what shares within 4th section, *ib.*—growing crops, 93 to 95—tenants' agreements, 95—agreements as to rent, *ib.*—agreement partially void, when void *in toto*, 96.

2. *Preparation of formal agreements*, p. 96.

Representatives, whether to be named in, 96—agreement on sale by auction refers to particulars, &c., *ib.*—on private sale, comprises what, *ib.*—on sale to railway companies, &c., 97.

3. *What informal documents may constitute an agreement*, p. 97.

What a sufficient agreement, 97—letters, receipt for money, entry of sale, arbitration bond, notice by or to company, 97 to 99—rent rolls, abstract, insufficient, 99—letters, when insufficient, *ib.*—recital, sufficient, 100—document must consist with alleged parol agreement, *ib.*—names of parties, *ib.*—offer by letter, 101—description of property, *ib.*—terms must be fixed, *ib.*—either by signed document or documents there referred to, 102—what reference sufficient, 102, 103—correspondence, when an agreement, 104—conditional acceptance, *ib.*—withdrawal and acceptance of offer, 104, 105—agreement sent as instructions, 105.

4. *The signature*, p. 105.

Of party charged sufficient, 105—other party must elect, *ib.*—what sufficient, 106—by agent, *ib.*—place for, *ib.*—signature as witness, 107—approval of draft agreement, &c., *ib.*—signature by public companies, 108—unauthorized alteration of agreement after signature, *ib.*

5. *The stamps*, p. 109.

What necessary on agreement, 109—several, when requisite, 110—loss of

unstamped agreement, *ib.*—document purporting to be, when chargeable as conveyance, 111—agreement in evasion of stamp laws, *ib.*

6. *Illegal agreements*, p. 111.

Agreement for illegal purpose, void, 111—champerty and maintenance, 111, 112—splitting votes for elections, 113.

CHAPTER VII.

EFFECT OF THE CONTRACT ON RIGHTS OF THE PARTIES.

1. *Purchaser entitled to estate and vendor to purchase-money*, p. 114.

Estate bound though vendor a trustee, &c., 114.

2. *Purchaser's general rights under contract as against vendor*, p. 115.

General nature of his interest, 115—it may be aliened, *ib.*—crops, windfalls, timber, &c., 115, 116—contract voidable, if property altered, *ib.*—he takes accidental benefits, and bears losses, *ib.*—in what cases, 116, 117—compulsory power of purchase not exhausted by contract, 118.

3. *Vendor's general rights under contract against purchaser*, p. 118.

Vendor has a lien on estate, 118—may restrain fall of timber, when, *ib.*—judgment against, charges purchase-money, 119—he may keep estate and deposit, when, *ib.*—rights of, as landlord, how affected, *ib.*—cannot sue purchaser for use and occupation, when, *ib.*

4. *Rights of vendor and purchaser, inter se, not affected by death, bankruptcy, &c., of either party*, p. 120.

5. *Death of vendor before completion, its effect on relative rights of his real and personal representatives, under old and under new Law*, p. 121.

Purchase-moneys go to personal, and interim rents and legal estate to real representatives, 121—conveyance of, how obtainable, *ib.*—contract under old law revoked prior devise in Equity, *ib.* 122—notice by company, whether a contract, *ib.*—relative rights of representatives depended on his liability to perform contract, 122, 123—subsequent events immaterial, if contract binding, *ib.*—rescinding of, or abandonment of contract, its effect, *ib.*—estate contracted for, how affected by devise, 124—effect of 1 Viet. c. 26, *ib.*

6. *Death of purchaser before completion: its effect on relative rights of his real and personal representatives under old and under new Law*, p. 125.

Such rights depended on his liability to perform contract, 125—if not so liable, heir had no claim on personal estate, *ib.*—relative rights of heir and devisee, 126—election, *ib.*—devisee's right to purchase-money, *ib.*—conveyance revoked will, when, 127—devise of land contracted for, &c., *ib.*—rights of heir and devisee since 1 Viet. c. 26, *ib.*—purchase of fee by termor, 128.

7. *Effect of contract in various special cases*, p. 128.

Mortgagee selling, may sue for mortgage debt, 128—liability of equitable purchaser of lease, 129—of lessor agreeing to buy underlease, *ib.*—of assignees, selling lease, *ib.*—agreement, excluded dower of after-taken wife, *ib.*

CHAPTER VIII.

AS TO THE ABSTRACT.

1. *General matters relating to the abstract*, p. 130.

Purchaser's right to, and to retain, 130—must be given up, if contract abandoned, *ib.*—vendor pays for, *ib.*—except on sales to railway companies, &c. *ib.*

2. *When it is perfect ;—what it must contain and show*, p. 131.

When perfect, 131—should state written consent of consenting parties, 132—must show where legal estate is vested, *ib.*—showing future title, insufficient at Law, *ib.*—incumbrances, whether a defect in Equity, 133—title good, though conveyance delayed, *ib.*—showing tenancy in tail, whether sufficient, *ib.*

3. *What should be furnished in various cases*, p. 134.

On purchase by tenant in common, &c., 134—of allotment, *ib.*—land taken in exchange, 135—from the Church, or under Inclosure Acts, *ib.*—or from a charity, 136—estate, with attendant terms, *ib.*—enfranchised copyholds, 137—leaseholds, *ib.*—renewable, or for lives, 138—shares in mines, *ib.*—or pews, *ib.*—must go back 60 years, *ib.*—or 100 years on sale of advowson, 139—must show creation of reversionary interest, *ib.*—except on sale of old term, *ib.*—rule the same, though estate be equitable, 140.

4. *Its preparation, contents, and delivery*, p. 140.

It should commence with a document, 140—of what kind, 140 to 142—exception, 142—should be continued regularly from commencement, *ib.*—all documents affecting legal estate should be abstracted, 143—in chief, *ib.*—statements of pedigree, *ib.*—documents evidencing immaterial or satisfied equities, 143 to 145—loss of deeds, 145—should notice judgments, &c., *ib.*—and be accompanied by what documents, &c., *ib.*—should be copied legibly, &c., 146—non-delivery of, *ib.*

5. *Its examination and perusal*, p. 147.

When to be compared with deeds, 147—consulting counsel, *ib.*—its perusal, 148—acceptance of title shown by, 149—defects in title, when not to be communicated, *ib.*

6. *Verification of the abstract*, p. 149.

What evidence requisite in proof of documents and facts, 149—of private Acts, *ib.*—inclosure awards, *ib.*—copyhold assurances, *ib.*—deeds, 151—recitals of,

when evidence, 153, 154—proof of Fines and Recoveries, 154, 155—of grant from Crown, *ib.*—proceedings at Law and in Equity, *ib.*—Bankruptcy and Insolvency, 156—under 1 & 2 Vict. c. 94, *ib.*—proof of will, 156 to 158—negative evidence, 158—deficiencies in proof of documents, supplied by presumption, 159—presumption of grant from Crown, *ib.*—reconveyance, *ib.*—copyhold surrender, *ib.*—payment of mortgage, 160—surrender to will, *ib.*—enfranchisement, *ib.*—mesne assignments, *ib.*—grant of easement, *ib.*—formalities of deeds, 161—livery of seisin, *ib.*—appointment of Inclosure Commissioners, *ib.*—stamps, *ib.*—not of certain forms required by Law, 161—general rule of presumption, 162—evidence of matters of fact, *ib.*—purchaser can require what facts to be proved, *ib.*—as to negative evidence, &c., 163—vendor must answer, what inquiries, 163, 164—need not explain adverse notice, not acted on, *ib.*—when required to prove will in equity, *ib.*—need not disclose confidential communications, 165—whether bound to produce will as negative evidence, *ib.*—or to prove intestacy, 165—purchaser cannot require copies of negative evidences, 166—want of proof of material facts, supplied by presumption, *ib.*—presumption of identity of parcels, *ib.*—or individuals, 167—of seisin, *ib.*—continuance of seisin, 168—of intestacy, *ib.*—official appointments, *ib.*—stock of descent, *ib.*—legitimacy, 169, 170—marriage, 171—death, 172—time of death, 173—survivorship, *ib.*, 174—failure of issue, *ib.*—against aged female having issue, 175—births, marriages, and deaths proved from registers, 176—or by declarations, &c., 177—entries in books, &c., *ib.*—old pedigrees, 178—inscriptions, &c., *ib.*—collateral matters, whether so proveable, 179—declarations must be “*ante litem motam*,” *ib.*—by party, in like interest, admissible, 180—recitals, when evidence, *ib.*—land-tax, redemption of, how proved, *ib.*—tithes, 181—commutation of, *ib.*—proof of composition, modus, or exemption, 182—facilitated by 2 & 3 Will. IV. c. 100, *ib.*—tithes, how affected by 3 & 4 Will. IV. c. 27, 183—defects in title, when supplied by 2 & 3 Will. IV. c. 71, and 3 & 4 Will. IV. c. 27, *ib.*—title under 2 & 3 Will. IV. c. 71, to light, 184—rights of way and other easements except light, *ib.*—rights of common, &c., 185—period for which possession must be proved, *ib.*—enjoyment must have been uninterrupted, as of right, 186—except as respects light, 187—interruption, what is, *ib.*—3 & 4 Will. IV. c. 27, 188—actions, &c., must be commenced within what period from accrual of right, *ib.*—time of accrual in certain cases, 189—general rule, *ib.*—administrator claims as from death, *ib.*—express trust, 190—charities, *ib.*—fraud, *ib.*—tenancy at will, *ib.*—mortgagor and *cestui que trust*, 191—tenancy from year to year, 192—right saved by acknowledgment of title, *ib.*—or receipt of rent or services, *ib.*—not saved by possession of joint owner, *ib.*—estates in remainder, &c., when barred, 193—married woman, 194—remainders expectant on estate tail, 194. 195—base fee, when to become fee simple, *ib.*—equity of redemption, 196—time for action, &c., by spiritual or eleemosynary corporation sole, 197—for recovery of advowson, &c., *ib.*—of money charged on land, 197. 198—of periodical payments, 198—purchaser

must accept title depending on Statute, 199—possession under Act bars the right, 200—adverse possession as against the Crown, *ib.*

CHAPTER IX.

AS TO THE PRODUCTION AND EXAMINATION OF THE DEEDS.

1. *As to the time, place for, and expenses of production*, p. 201.

Deeds, where to be produced, 201—expenses, *ib.*—notice of place, 202—deeds producible only under covenant, *ib.*—grants from Crown, *ib.*—instruments on record, *ib.*—examination of deeds before perusal of title, *ib.*

2. *Production of deeds, who may compel*, p. 202.

Owner of undivided share, 202—of estate held under one of several titles created by same instrument, *ib.*—purchaser of portion of estate, 203—contingent remainderman cannot, *ib.*—whether vested remainderman can, *ib.*—remainderman under purchase-deed, 204—unpaid mortgagee need not produce deeds, *ib.*—exceptions from rule, 204, 205—liability of mortgagee for their loss or destruction, *ib.*

3. *Non-production of deeds—how far important*, p. 205.

It may be notice of their deposit, 205.

4. *Examination of deeds, matters to be observed in*, p. 206.

CHAPTER X.

AS TO MATTERS ARISING BETWEEN DELIVERY OF ABSTRACT AND PREPARATION OF CONVEYANCE.

1. *Time, when essential at Law and in Equity*, p. 208.

Is essential at Law, 208—not in Equity, unless by agreement, or under special circumstances, *ib.*—as where vendor incurs fresh liability, 209—or property is of fluctuating value, *ib.*—or determinable character, *ib.*—or is evidently required at once, *ib.*—or vendors are a fluctuating body, *ib.*—tendency of modern decisions, *ib.*—purchase-money being wanted to discharge incumbrances, is material, 210—private unexpressed motives for purchase immaterial, *ib.*—effect of, if subsequently communicated, *ib.*—undertaking to deliver possession not binding in Equity, *ib.*—wilful delay concludes in Equity, *ib.*—either vendor, *ib.*—or purchaser, 211—less time now allowed, *ib.*—title at hearing, when sufficient in Equity, *ib.*—rule at Law, *ib.*—time may be limited by notice, *ib.*—allowing a reasonable period, *ib.*—vendor giving notice need not return deposit, 212—purchaser giving notice need not sue for deposit, *ib.*—cannot determine contract without notice, *ib.*—

time, when held to remain optional, *ib.*—although essential may be enlarged or waived, 213—by proceeding in purchase, *ib.*—or neglecting to require possession, *ib.*—how not enlarged at Law, *ib.*—conditional waiver, *ib.*—time for delivery of abstract, how waived in Equity, 213, 214—waiver by not objecting to certain or highly probable delay, *ib.*—effect of protest, *ib.*—“month,” 215.

2. *Objections to title ;—negotiations upon and waiver of ;—when possession taken amounts to waiver, p. 215.*

Effect of negotiations on condition as to objections, 215—solicitor purchasing from client cannot object to title which he accepted, *ib.*—danger of frivolous objections, &c., *ib.*—or of withholding objections, &c., 216—purchaser's *primâ facie* right to good title, *ib.*—may be waived, 217—counsel's opinion, when not binding, *ib.*—acceptance of title, subject to specified requisition, *ib.*—waiver may be implied, *ib.*—from apologies for non-payment, *ib.*—from payment for and dealing with estate, 218—preparation, &c., of conveyance, when a waiver, *ib.*—attempt to resell, no waiver, *ib.*—to resell part, *ib.*—possession, when evidence of waiver, 219, 220—leasing, equivalent to possession, 220.

3. *As to the general rights and liabilities of a purchaser in possession, 220.*

He may generally act as owner, without waiving title, 220—whether so after discovery of defect, 221—retention of possession and refusal to discuss title, an acceptance, *ib.*—waiver of title, but not of compensation, *ib.*—waiver, how modified, *ib.*—purchaser rejecting title may be ejected without compensation for expenditure, *ib.*—what allowance made when vendor sues in Equity, 222—purchaser whether liable for use and occupation, if title bad, *ib.*—giving up possession may maintain use and occupation after completion, when, 223—rejecting title must reinstate altered premises, *ib.*

4. *Vendor in possession, by altering property, avoids the contract, p. 223.*

Material alteration of property by, may avoid contract, 223, 224—*e. g.*, fall of ornamental timber, 224—alterations in value of estate, or failure of consideration, *ib.*

5. *As to entry and possession by railway companies before completion, p. 224.*

Provisions of Lands Clauses Consolidation Act, 1845, as to entry, &c., 224, *et seq.*

CHAPTER XI.

AS TO SEARCHES FOR, AND INQUIRIES RESPECTING, INCUMBRANCES.

1. *What inquiries should be made of vendor's solicitors and of supposed incumbrancers, trustees, and tenants, p. 227.*

Inquiry to be made of vendor's solicitors, 227—and supposed incumbrancers,

ib.—whether incumbrancer need communicate his claim, 228—inquiry to be made of trustees, *ib.*—but does not give priority, 229—liability of trustee, *ib.*—inquiry of tenants, *ib.*

2. *What searches should be made for incumbrances—law respecting judgments, &c., p. 229.*

Liability of solicitor omitting to search for incumbrances, &c., 229, 230—general law respecting judgments, 230—purchasers, &c., without notice, not affected by 1 & 2 Vict. c. 110, *ib.*—want of notice not to be relied on, *ib.*—judgments under old law, what they do or do not affect, 231—docketing necessary, *ib.*—purchaser bound by notice of undocketed judgment, *ib.*—Equity aided creditor, when, *ib.*—effect of bankruptcy, *ib.*—purchaser without notice, protected by legal estate, *ib.*—with notice, protected by exercise of power of appointment, 233—judgment after contract, *ib.*—extended remedies of creditor under 1 & 2 Vict. c. 110, 233 to 236—effect of bankruptcy, *ib.*—creditor postponed to *cestui que trust*, or prior equitable incumbrancer, 237—judgment, whether a charge on mortgage debt, *ib.*—is a charge on annuity issuing out of, 238—on legacy charged on land, *ib.*—or unpaid purchase-money, *ib.*—and surplus proceeds of sale by mortgagee, *ib.*—certain decrees and orders operate as judgments, *ib.*—remedies under new law depend on registration, 238, 239—to be renewed every five years, 239—whether so as to palatinate judgments, 239, 240—whether such judgments bind purchasers without notice, *ib.*—effect of notice of unregistered judgment, *ib.*—of judgment docketed but not registered, or registered but not re-registered, 241—Crown debts and accountants, *ib.*—*lis pendens*, 242—Court rolls and local registers, *ib.*—bankruptcy and insolvency courts, *ib.*—annuities, 243—recovery deeds, and acknowledgments by married women, *ib.*

3. *Time for making searches and inquiries, p. 243.*

Searches, &c., time for, 243—unnecessary, costs of not allowed, 244.

CHAPTER XII.

AS TO THE PREPARATION OF THE CONVEYANCE.

1. *General matters relating to, and to the form of, p. 245.*

Purchaser prepares conveyance, 245—manorial custom, *contra*, valid, *ib.*—conveyance of equitable interest, *ib.*—preparation of, no acceptance of title, 245, 246—whether purchaser can require outstanding interests, &c., to be got in by separate deed, 246—statement of unnecessary matters, &c., ineligible, 246, 247—disentailing deeds, 247—statutory railway conveyances ineligible, *ib.*—parliamentary forms of 1845, *ib.*—incumbrances, when to be got in by separate deed, 248—how to be kept on foot, if desired, *ib.*—

distinct estates, &c., should be dealt with by separate deeds, *ib.*—Act for Merger of satisfied Terms, its effect, *ib.*

2. *As to the parties*, p. 250.

Who must be, 250—stipulation that unnecessary parties shall concur, *ib.*—purchaser from mortgagee cannot require mortgagor's concurrence, *ib.*—bankrupt, when a party, 250, 251—dowress, 251—assignment of term, whether a sufficient bar of dower, *ib.*—jointure, 252.

3. *As to the recitals*, p. 252.

Should be used, with what object, 252—whether desirable in disentailing assurances, 253—of vendor's title, effect of, *ib.*—of written agreement, when desirable, 254—of objections, in deed of confirmation, *ib.*

4. *As to the consideration, words of conveyance, and parcels*, p. 254.

Consideration to be truly stated, 254—fixtures, timber, &c., 254, 255—chattels passing by delivery, 255—recital of sale, its effect, *ib.*—apportionment of consideration, *ib.*—sale in consideration of transfer of stock or grant of annuity, 256—compensation, on sale to Railway Company, 256, 257—operative words, 257—reference to, 4 & 5 Vict. c. 21, unnecessary, *ib.*—dower uses, *ib.*—forms of conveyance in colonies, *ib.*—parcels, how described, 258—mines, &c., when to be specified, *ib.*

5. *As to the covenants*, p. 258.

Covenants for title, 258—solicitor's liability, respecting, *ib.*—what entered into by absolute beneficial owner, 259—for whose acts, *ib.*—owner covenants on sale by Court or trustees, 260—landowner's covenants on sale to Railway Company, *ib.*—covenants by tenants for life, 260, 261—by husband and wife, on sale of her estate, *ib.*—by fiduciary vendors, *ib.* 262—incumbrancer releasing, *ib.*—Crown gives no covenants, *ib.*—parties interested in purchase-money, *ib.*—covenants against known defect, *ib.*—for production of deeds, 263—purchaser's right to, *ib.*—respecting what document, 264—with whom vendor should covenant, *ib.*—purchaser's covenants with vendor, 265—on purchase of equity of redemption, *ib.*—leaseholds, *ib.*—or freeholds subject to quit rent, &c., *ib.*—for production of deeds, *ib.*—agreement against using land in specified manner, how carried out, 266—covenants by purchaser of minerals, *ib.*—by purchaser in consideration of annuity, *ib.*—purchaser not executing conveyance, yet bound in Equity by covenants, *ib.*

6. *As to draft and engrossment*, p. 267.

Alterations in draft should be communicated, 267—engrossment, *ib.*—belongs to purchaser, *ib.*—executed, and then contract rescinded, *ib.*

CHAPTER XIII.

AS TO MATTERS RELATING TO THE COMPLETION
OF THE PURCHASE.

1. *The execution of the conveyance by married women, &c. ; conveyance of trust estates under the Trustee Act, 1850, p. 269.*

Vendor must convey in person, 269—conveyance of freeholds by married woman must be acknowledged, 269, 270—acknowledgment, practice respecting, 270 to 272—assurance of her copyholds, 272—or reversionary interest in proceeds of sale of, or money to be invested in, real estate, 273—or her terms for years, *ib.*—husband's concurrence, when dispensed with, 273, 274—conveyance of her contingent interests, and disclaimer, 275—assignment of terms by executors, &c., *ib.*—power for promoters of public undertakings to convey to themselves, *ib.*—trustees must convey at request, &c., 276—by what description, *ib.*—mortgagee need not convey before time fixed for redemption, *ib.*—assignee in bankruptcy, *ib.*—conveyance of legal estates from trustees, lunatics, or infants, under Trustee Act, 1850, 277—the Court may, in several specified cases, make vesting or releasing order, operating as an assurance, 277, 278—and may make vesting order in respect of mortgaged lands in specified cases, 278, 279—or may appoint person to convey, &c., *ib.*—as to copyholds, *ib.*—Court may declare who are trustees of land comprised in suit for specific performance, &c., 280—orders under Act, how obtainable, *ib.*—certain allegations, evidence, if order made thereon, 280, 281—no escheat of trust and mortgage estates, 281.

2. *As to the discharge of incumbrances, p. 281.*

Vendor liable for incumbrances, &c., until conveyance executed, 281, 282—incumbrances must be paid off or released, *ib.*—discharge of, under the Lands Clauses Consolidation Act. 1845, 283.

3. *As to purchaser's liability to see to application of trust purchase-money, p. 283.*

Liability ~~test~~ by intention of author of trust, *semble*, 283—as expressed or implied, *ib.*—matters posterior to creation of trust, neither take away, 284—nor confer power to give receipts, *ib.*—what circumstances attending trust confer it by implication, 284, 285—cases where no such power is implied, 285—subsequent events not material either way, 286, 287—distinction, where the sale itself is a breach of trust, 288—case of sale to provide for deficiency in personal estate, 289—purchase-money is payable to deceased vendor's executor, 290—surviving trustees can give receipts, when, *ib.*—trustee irregularly appointed, *ib.*—all trustees must join, *ib.*—7 & 8 Vict. c. 76, *ib.*—power to lend on mortgage implies power to give receipts, 291—application of purchase-money in payment of charges, *ib.*—when estate is

intended to be a continuing security, 291—and when immediate sale is contemplated, *ib.*—charge of debts equivalent to trust for sale to pay, 291, 292—statutes making real estates assets not equivalent to charge of debts, 292—receipt under usual power of attorney, when not a sufficient discharge in equity, 292.

4. *Amount payable in respect of purchase-money, how increased or diminished, p. 293.*

Increased by interest; rate of, 293—payable from what time if delay rests with purchaser, *ib.*—or with vendor, *ib.*—whether, until title shown, purchaser may appropriate his money, 294—purchaser in possession pays interest although contract ambiguous, *ib.*—is payable, from what time, if no time fixed for completion, 295—on sale of reversion, *ib.*—on valuation of timber, 295, 296—fixtures, 296—leaseholds, 297—trade premises, *ib.*—what a sufficient appropriation of purchase-money, 297, 298—payment into Bank, *ib.*—purchaser acceding to delay, *ib.*—express agreement to pay interest, effect of, *ib.*—“unavoidable obstacle,” &c. &c. 299 to 302—agreement to take profits excludes interest, 302—increase of purchase-money for excess in quantity, 303—statutory acre, *ib.*—vendor’s right to compensation, doubtful, 304—variations in quality of estate, no allowance, *semble* in his favour, *ib.*—purchase-money how diminished, 305, 306—by proceeds of estate received, &c., by vendor, 306—deteriorations, *ib.*—abatement in respect of original defects, 307—for deficiency in quantity, *ib.*—effect of expressions “by estimation,” &c., 308—purchaser’s right confined to compensation, *ib.*—surface deficiency on sale of woods, 309—abatement in respect of deficiency in quality, *ib.*

5. *To whom and how purchase-money should be paid, p. 310.*

Agent or solicitor not authorized as such to receive it, 310—to whom it should be paid, *ib.*—on sale in bankruptcy, 311—lien of third party advancing it, as against purchaser’s assignees, *ib.*—payment on sale to Railway Companies, &c., *ib.*—*prima facie* right of parties in possession, 312—affidavit on petition for payment out of Court, *ib.*—re-investment, 313.

6. *As to purchaser’s right to deeds, attested copies, &c., 314.*

Purchaser’s right to deeds, &c., 314—on purchase of only part of estate, *ib.*—although vendor has covenanted to produce them to other parties, *ib.*—sale under a settlement, *ib.*—liability of mortgagee settling several mortgages by a single deed, 315—purchaser not entitled to negative evidences, *ib.*—his right to attested copies, 315, 316—covenant for production, 316—absence of documents not produced should be explained, 316, 317.

7. *Matters necessary to ensure the full effect of the executed conveyance, registration, enrolment, &c., p. 317.*

Local registration, 317—what interests are excepted from the Acts, 317, 318—copyholds, 318—leases at rack rent, what are, *ib.*—for twenty-one years,

318—London not within the Middlesex Act, *ib.*—assignment of money charged on land, *ib.*—deed of appointment, 319—Railway conveyances, &c., *ib.*—will, *ib.*—memorial, its contents, *ib.*—attestation of, *ib.*—where deed conveys several shares or estates, 320—registration under Bedford Level Act, *ib.*—enrolment under Mortmain Act, *ib.*—enrolment of disentailing deed, 321—consent of protector, *ib.*—assurances on sale by tenant in tail of copyholds, 321, 322—certificate of acknowledgment by married women, 323—entry on Court rolls of copyhold assurances, *ib.*—conveyance of contingent interest in copyholds, 324—assurance of copyholds under the L. C. C. Act 1845 to be entered on Court Rolls, *ib.*—indorsed notice of conveyance, when expedient, 324, 325—notice to trustees, *ib.*—to mortgagee on purchase of equity of redemption, *ib.*

8. *As to stamps*, p. 325.

Deed unstamped, not evidence, 325—may be stamped after execution, *ib.*—*ad valorem* duty payable only on consideration stated, 326—on what consideration, 326, 327—amount may be reduced, to lessen duty, 328—family arrangement, *ib.*—money paid for lease granted at request, *ib.*—duties payable under 13 & 14 Vict. c. 97, *ib.*—commissioners may determine proper amount, 329—certain conveyances exempted from increased duty, *ib.*—what payable on single conveyance to joint purchasers, *ib.*—or in case of subsales, 330—on single conveyance of separate estates to sole purchaser, *ib.*—deed of confirmation, *ib.*—principal assurance, *ib.*—denoting stamp, *ib.*—steward to deliver out copies of Court Roll stamped, *ib.*—conveyance by several owners, 331—deed with double operation, *ib.*—matters not involving additional duty, 332—deed stamp unnecessary, although *ad valorem* duty under 35s., *ib.*—indorsed receipts, &c., are counted, *ib.*—stamps of improper denomination, 333—presumption as to stamps, *ib.*—alteration of instrument, *ib.*

9. *As to costs*, p. 334.

Of conveyance, purchaser pays, 334—of execution, vendor pays, *ib.*—expenses, how borne on purchase of copyholds, 335—costs of lease, 336—of conveyance, in consideration of rent-charge, *ib.*—on sale under L. C. C. Act, *ib.*—of re-investing purchase-money, &c., 337 to 339—additional expenses, if estate is encumbered, &c., 339, 340—as to taxation under 6 & 7 Vict. c. 73, 340 to 342—under general jurisdiction, 343—under 8 & 9 Vict. c. 119, *ib.*

CHAPTER XIV.

AS TO THE EFFECT OF THE CONVEYANCE ON THE RELATIVE RIGHTS OF VENDOR AND PURCHASER.

1. *Vendor's lien on estate for unpaid purchase-money*, p. 344.

Vendor's lien 344, 345—general nature of and incidents to, 345, 346—marshalling for, 346—is lost by taking independent security, *ib.*—not by taking note,

bill, or bond, 346—although for deferred payment, 347—or third parties join in note or bill, *ib.*—effect of surety joining in bond, *ib.*—of conveyance being expressly in consideration of covenant, *ib.*—payable on an incalculable contingency, *ib.*—or, expressly, in consideration of a bond, *ib.*—or, in mere fact, in consideration of a covenant or bond, 348—if bond be for payment on an incalculable contingency, *ib.*—or on calculable contingency, *ib.*—or for an annuity consideration, 348, 349—or if sale be of a reversion, 349—lien may subsist as to only part of unpaid money, 350—presumable intention either way may be rebutted, *ib.*—lien how lost as against third parties, *ib.*—none implied in favour of disqualified parties, *ib.*—is merely equitable, vendor cannot at once sue at Law and in Equity, 351—its effect when purchase-money remains on mortgage, *ib.*—vendor cannot claim miscalculated interest, *ib.*

2. *Whether the vendor has any remedy if estate has been sold at an undervalue, or more has been conveyed than was intended, p. 351.*

Not for mistake as to extent or value of property, 351—or extent of his interest, 352—*aliter*, if property not intended to be dealt with is conveyed, *ib.*—or if in fixing price he rely on purchaser's information, 353—or if being ignorant or distressed he sell at undervalue, *ib.*—general rule as to distress, *ib.*—inadequacy of consideration no general reason for setting aside conveyance, 354—uncertain amount of purchase-money, *ib.*—on sales of reversionary interests, *onus probandi* lies on purchaser, *ib.*—what interests are considered such, 254, 355—reversioners relieved as well as expectant heirs, 355—voluntary confirmation, *ib.*—heir when deprived of special protection, 356—adequacy of consideration how determined, 357—sale of goods, *ib.*—sale fraudulent as against tenant in tail, set aside at suit of remainderman, 358—terms of relief, *ib.*—acquiescence and confirmation, 359.

3. *Vendor's rights of pre-emption under Lands Clauses Consolidation Act, 1845, p. 359.*

Provisions of Act in respect of superfluous lands, 359.

4. *Vendor's remedies at Law and in Equity on purchaser's covenants, p. 360.*

Purchaser's covenants classified, 360—whether first class run with the land, 361—second class do not, *semble*, but in Equity bind alienee with notice, *ib.*—but not always, 362—third class, remedies on, *ib.*—Covenantor liable on covenants in gross, *ib.*—assignee not liable on collateral covenant, 362, 363—effect of bankruptcy, 363.

5. *Purchaser's remedies on vendor's covenants, p. 363.*

Are in general his only remedies for defects after conveyance, 363—covenants for title, 364—who are liable on, *ib.*—benefit of, runs with land, when, 364 to 366—covenants in conveyance of equitable estate, *ib.*—assignee may sue on, in name of covenantee, *ib.*—breach of covenants for title, *ib.*—Statute of Limitations, *ib.*—covenants for seisin and right to convey, how broken, 367—action before eviction, *ib.*—covenant for quiet enjoyment, and free from

incumbrances, 367—particular expressions, 368, 369—covenants against known defects, 369—for further assurance, 370, 371—for title, how restricted, 371—how classified, *ib.*—restrictive words, effect of, 372, 373—who may sue for breach, 373, 374—what damages recoverable, 374, 375—bankruptcy and certificate, where no defence, 375, 376—formerly no action of covenant lay against devisee, 376—alteration under 1 Will. IV. c. 47, *ib.*—damages when claimable as debt in administration suit, *ib.*—not apportioned between tenant for life and remainderman, 377—purchaser's remedies on vendor's covenants other than for title, 377, 378.

6. *Purchaser's remedy in Equity under special circumstances, if title prove defective*, p. 378.

Purchaser with defective title, when relieved in Equity, 378, 379—wilful misrepresentation, 379—fraud of agent, 380—terms of relief, *ib.*

7. *As to purchasers right to pay off incumbrances out of unpaid purchase-money*, p. 381.

8. *Purchaser's remedy in Equity if he buy his own estate, or if lands are omitted from conveyance, and as to further assurance in Equity and by Statute*, p. 382.

Purchaser buying his own estate, relieved, 382—whether so if he buy estate which has no existence, *ib.*—he may claim lands shown to him, or accidentally omitted, 382, 383—may require vendor to convey subsequently acquired interests, 383—although sale were of mere expectancy, *semble*, 384, 385—no estoppel by doubtful recital, 385—voidable estate created by tenant in tail, confirmed by subsequent assurance, *ib.*

9. *As to the general rights and liabilities of purchaser under conveyance*, p. 386.

Purchaser's right to rent, 386—to sue for breach of covenant, *ib.*—re-entry, *ib.*—next estate now the reversion, 387—purchaser's rights and liabilities as lessee cease on conveyance, *ib.*—vendor retaining possession not liable for use and occupation, *ib.*—purchaser's will, how affected, *ib.*—conditional conveyance and mortgage distinguished, 388.

CHAPTER XV.

AS TO THE EFFECT OF THE CONVEYANCE ON THE ADVERSE RIGHTS OF THIRD PARTIES.

1. *Purchaser without notice, protected by legal estate against prior claimants*, p. 389.

If Equities equal, legal estate prevails, 389—purchaser without notice paying purchase-money and acquiring legal estate under conveyance, 389, 390—or by subsequent assurance, acquires indefeasible title, 390—though

vendor had no title in Equity, 390—notice of another's better right to legal estate is notice of all his equities, 390, 391—legal estate from trustee with notice, whether available, 391—from unsatisfied incumbrancer, *ib.*—best right to call for, protects, 392—equity will not in general act against *bonâ fide* purchaser without notice, *ib.*

2. *Purchaser with mere equitable title is postponed to prior equitable claimants*, p. 392.

Between mere equitable claimants prior title prevails, 392—mortgagees by deposit bound by secret trust, 393—no priority by notice to owner of legal estate, *ib.*—concealed incumbrance thrown wholly on puisne equitable purchaser, *ib.*—charities, 394.

3. *Purchaser, how far protected against defective execution of powers; against prior claimants who have encouraged him to purchase; and by Statute in various cases*, p. 394.

Relief against defective execution of powers, 394—against incumbrancers, &c., encouraging purchase of, or subsequent expenditure on, property, 394, 395—omission to take deeds, whether material, 395—assignees of insolvent delaying to assert their rights yet not postponed, 396—protection against vendor's assignees in Bankruptcy and Insolvency, 396 to 398—judgment creditors, 398—defects in fines or recoveries, 399—or in sales of land tax, *ib.*—or against *lis pendens*, *ib.*

4. *As to priority under Registration Acts*, p. 399.

Protection against unregistered deeds, 399—prior registration conclusive at Law but not in Equity, *ib.*—purchaser's title how impeachable under the Acts, 400, 401—priorities under Fines and Recoveries Abolition Act, 402.

5. *As to notice—what it is, how it may be proved, and its effect—of void or voidable estates and voluntary or fraudulent conveyances; equitable relief against purchaser with notice*, p. 402.

Notice of unregistered assurance or judgment must be actual, 402—to solicitor, is notice to client, *ib.*—when, by whom, and how, to be given, 402, 403—of doubtful instrument, 404—constructive notice, nature of, 404 to 406—negligence may have the effect of, 406—notice of particular fact, &c., held to be notice of connected facts, &c., 407—purchaser held to have notice of facts which he ought to have known, 408, 409—cases where he is not affected with notice, 409 to 412—he need not use excessive caution, 412—notice to counsel, solicitor, or agent, is notice to purchaser, *ib.*—although solicitor, &c., is employed by both parties, or is himself the vendor, 413—professional confidential communications, notice not to be proved by, 414—cases, opinions, &c., 415—effect of notice, *ib.*—of void or voidable estates, agreements, &c., 416 to 419—of fraudulent conveyances, &c., immaterial, *ib.*—what are such, 420—marriage, a consideration, 421—limitations to collaterals, whether valid, 421, 422—supported by necessary concurrence

of third person, 423—or by being prior to limitations to issue of marriage, *ib.*—settlement by widow, 424—unexpressed consideration may be proved, *ib.*—settlement may be supported by matter *ex post facto*, *ib.*—whether heir or devisee can set aside voluntary or fraudulent deed, *ib.*—revocable settlements are fraudulent, 425—vendor's want of notice protects purchaser, *ib.*—settlements to defraud creditor, void, 426—on what terms purchaser evicted if estate belong to infant, 427—Statute of Limitations begins to run on conveyance by trustees, *ib.*

6. *As to contribution to paramount charges*, p. 428.

7. *As to rights of third parties, after conveyance, in various cases*, p. 429.

Provision in Lands Clauses Consolidation Act, 1845, for purchase of omitted interests, 429—incumbrancer has no claim against vendor for purchase-money, when, *ib.*—conveyance of equity of redemption to mortgagee, 430—mortgagee selling after foreclosure cannot resort to collateral securities, *ib.*—purchaser from mortgagee bound by agreement with mortgagor for redemption, *ib.*—conveyance determines parol licence, *ib.*—purchaser of part of rent-charge may distrain, *ib.*—purchaser, when liable for nuisance, 430, 431.

CHAPTER XVI.

AS TO THE RIGHTS, UNDER THE CONVEYANCE, OF JOINT PURCHASERS AND PERSONS OTHER THAN THE NOMINAL PURCHASERS.

1. *As to joint purchasers*, p. 432.

Purchasers joint tenants at Law, when so in Equity, 432, 433—joint tenant's lien for expenses of repairs, &c., and renewal fines, 433, 434—advantage secured by partner enures to benefit of co-partners, 434—partner in speculation must conform to agreement, *ib.*—trust for co-purchasers, how proved against nominal purchasers, 434, 435.

2. *As to purchases in the name of a nominal purchaser*, p. 435.

If consideration be paid by others than nominal purchasers there is a resulting trust, 435—custom, *contra*, is bad, 436—payment proveable by parol evidence, *ib.*—conveyance may be shown to be a mortgage, 437—*primá facie*, no trust results on purchase in name of wife or child, 437, 438—presumption of advancement may be rebutted, how, 438 to 440—election 440—purchases in name of child or wife not within the 27th or 13th Eliz., *semble*, 441—resulting trust may be rebutted, *ib.*—land purchased with trust-money becomes impressed with trust, *ib.*—proof of application, *ib.*—*cestuis que trust* can claim money or land purchased in breach of trust, 442.

CHAPTER XVII.

REMEDIES AT LAW FOR BREACH OF CONTRACT.

1. *Purchaser's remedies against vendor*, p. 443.

Vendor in default, purchaser's right of action, 443, 444—agents may sue and be sued, when, 444—purchaser can recover, what, in action after rescinding contract, 445—what in action for damages, 445 to 447—death of purchaser, personal representatives may sue, 447—death of vendor, liability of his representatives, 448.

2. *Vendor's remedies at law against purchaser*, p. 448.

Right of action in vendor or his representatives against purchaser and his representatives, 448—vendor cannot recover entire purchase-money if no conveyance, *ib.*—purchaser, whether liable for use and occupation, *ib.*

3. *Plaintiff, how far bound to perform his part of the agreement before action*, p. 449.

Mutual agreements, when dependent, 449, 450—refusal to convey, no defence to action on security for purchase-money, 451.

4. *As to the agreement, how affected by parol evidence*, p. 451.

Parol evidence inadmissible to vary contract, 451—how far admissible to explain, 451, to 453.

5. *Production of agreement, when compelled*, p. 453.6. *Grounds of defence at Law, the agreement being admitted*, p. 454.

Original invalidity of contract, 454—or subsequent waiver, *ib.*—or release, 455—or satisfaction, *ib.*—or Statute of Limitations, *ib.*

7. *Action, when restrained in Equity*, p. 455.8. *General matters relating to the action*, p. 456.

Particulars of claim, 456—time is at Law essential, *ib.*—equitable objections to title, a defence, 457.

CHAPTER XVIII.

AS TO SPECIFIC PERFORMANCE.

1. *Matters relating to the jurisdiction generally*, p. 458.

Specific performance, the only remedy in Equity, 458, 459—Court of Bankruptcy cannot enforce, *semble*, 459—on what principle decreed, *ib.*—vendor may sue for purchase-money in Equity, why, 459, 460—existence of remedy by *mandamus*, whether a bar, 460—plaintiff cannot proceed at once at Law and in Equity, *ib.*—Specific performance, when decreed, although contract may vest estate in purchaser, 460, 461.

2. *By whom specific performance will be enforced*, p. 461.

At suit of purchaser or his representatives in interest, 461—or of vendor or his representatives in interest, *ib.*

3. *Against whom specific performance will be enforced*, p. 462.

Against vendor and parties claiming under him by subsequent title (except purchasers without notice), 462—or under prior title, which he might have displaced by conveyance, *ib.*—contract for sale of married woman's estate, 463—of her chattels real, 464—whether she may adopt husband's contract, *ib.*—vendor's contract not enforced against parties claiming under prior absolute title, *ib.*—purchaser's contract enforced against himself and his representatives, 464, 465—against separate estate of married woman, 465.

4. *As to the parties to the suit*, p. 465.

Parties to contract, in general, sole necessary parties to suit, 465—purchaser cannot join, as co-defendants, receiver or steward, *ib.*—or parties claiming adverse interests prior to the contract, 465, 466—person interested in contract and bound to convey not a necessary party to vendor's bill, 466—persons having adverse, inconsistent, or no rights, cannot join vendor as co-plaintiffs, *ib.*—but may be defendants (*semble*), 467—purchaser of one lot, when a necessary party to sue in respect of another lot, *ib.*—agent, or auctioneer, when to be a party, 467, 468—death of vendor, who then may sue, and who are proper parties, 468—to purchaser's suit, 469—alienation of vendor's interest by act *inter vivos*, who are proper parties, *ib.*—death of purchaser, who then may sue, and who are proper parties, 469, 470—to vendor's suit, 470—alienation of purchaser's interest by act *inter vivos*, who are proper parties, *ib.*

5. *As to the bill*, p. 470.

Suit may be commenced by bill or claim, 470—form of bill, 471—need not allege signature, &c., *ib.*—letters, how to be referred to, *ib.*—inferences of law, whether to be stated, *ib.*—waiver relied on should be alleged, *ib.*—and facts supporting it stated, 471, 472—prayer for general relief, what to be obtained under, 472.

6. *As to proceeding by claim under the Orders of April*, 1850, p. 473.

Ordinary claim, 473—special claim, *ib.*—writ of summons, *ib.*—who to be named defendant, 473, 474—showing cause, *ib.*—hearing, and order thereon, *ib.*—effects of order, *ib.*—Court at hearing may direct bill to be filed, *ib.*—form of order, 475—plaintiff may proceed by bill, when, *ib.*—extra costs occasioned by bill, *ib.*—in what cases orders apply, *ib.*

7. *As to how the plaintiff's case may be sustained in the absence of a written agreement*,—*fraud*, *part-performance*, *admission by defendant of parol agreement*, *parol variation of written agreement*, p. 476.

Written agreement dispensed with, 476—on the ground of, 1st, *fraud*, 477—

2nd, *part performance*, what acts of, sufficient, 477—or insufficient, 478—expenditure by tenant, 479—verbal notice and retention of possession by tenant, held to be a sufficient declaration of option to purchase, 480—case of mere acquiescence in heavy expenditure and no agreement, *ib.*—plaintiff, how far bound to show precise terms of contract, 481—immaterial terms, though stated, need not be proved, *ib.*—material terms must ultimately be clearly shown, *ib.*—act by defendant, merely to his own prejudice, no part performance, 482—nor does part performance as to one lot affect another lot, *ib.*—sales by auction and in bankruptcy are within the statute, *ib.*—3rd, *admission of agreement*, and statute not insisted on, *ib.*—purchaser cannot in general enforce specific performance of written contract with parol variation, 483—subsequent parol variation enforceable only if part performed, *ib.*

8. *As to grounds of defence negating plaintiff's right to specific performance, except with a variation of the original written agreement; viz., fraud, mistake, misrepresentation, unfulfilled promise, parol variation, &c., p. 484.*

1st, Fraud, or mistake, affecting the terms of the agreement, 484—2ndly, fraud, mistake, or surprise, inducing defendant to enter into agreement, misapprehending its effect, 484, 485—mere suspicion of fraud insufficient, *ib.*—3rdly, misrepresentation or unfulfilled promise, inducing defendant to enter into agreement, knowing its terms and effect, 485, 486—parol addition, when admissible, 487—stipulation omitted by consent, no defence, 488—4th, subsequent parol variation part performed, *ib.*

9. *As to grounds of defence negating in toto plaintiff's right to specific performance; viz., personal incapacity; nature of contract, or fraud, &c., &c. attending its execution; matters relating to the estate, title, or consideration; plaintiff's conduct, &c., after contract; election of other remedy, p. 488.*

1st, Personal incapacity to contract on part of defendant, 489—intoxication, *ib.*—personal incapacity on part of plaintiff, how far a defence, *ib.*—2nd, matters relating to the contract, &c.; illegality, 490—impolicy, *ib.*—breach of trust, *ib.*—improvident contract by agent, 491—hardship, *ib.*—fraud, mistake, surprise, misrepresentation, or concealment, 492—fraud of third person, when immaterial, 493—want of mutuality of remedy, whether a defence, 493 to 495—nominal contractor, 496—insertion of penalty no defence, *ib.*—inability to recover damages at Law, how far a defence, *ib.*—3rd, matters relating to the estate; original defects in, 497—public nuisance, *ib.*—destruction of estate, 498—4th, matters relating to the title; want of, considered as a vendor's defence, *ib.*—vendor must convey part of estate with abatement, 499 to 501—must convey partial interest with an abatement, when, 501 to 503—indemnity, 503—vendor's and purchaser's rights as to abatement, not reciprocal, *ib.*—purchaser's right to, how lost, *ib.*—vendor, how far bound to make good interest contracted for out of his own higher interest, 504—want of title, where a defence for purchaser declining abate-

ment, 504—where estate is of different tenure, *ib.*—or is held in a different manner, *ib.*—or no title is shown to the same extent of interest as he contracted for, 404, 405—or no title is shown to a material part of estate, 505—or incumbrances or liabilities exist which would affect its enjoyment, 506—or matters exist which increase his proposed liability, *ib.*—or affect the enjoyment of material part of property, 507—defect in title to one of several lots, *ib.*—benefit of defence, how lost to purchaser, 508—defects in title which are not a purchaser's defence, *ib.*—limited instead of unlimited right of common, *ib.*—small quit-rents, &c., *ib.*—tithes, when freedom from title was no part of inducement, 508, 509—existence of footway, 509—5th, matters relating to consideration, 510—inadequacy of, when a vendor's defence, *ib.*—sale by auction, *ib.*—sale of unascertained interest, 511—consideration uncertain in amount, whether question of inadequacy thereby excluded, *ib.*—reversionary interests, 512—failure of contingent consideration, *ib.*—excess of purchase-money, when a purchaser's defence, *ib.*—6th, conduct of plaintiff after contract, when a defence, 513—release, waiver of, or delay to enforce the contract, 514—what delay in filing bill a defence, *ib.*—conduct of plaintiff, waste of estate, 515—ejectment of purchaser rightfully in possession, *ib.*—inability of vendor to perform material stipulation under contract, 515, 516—election of remedy, action brought and damages recovered, 516.

10. *As to the proceedings in the suit; viz., payment of purchase-money into Court, reference of title and proceedings thereon, decree for plaintiff, conveyance, decree dismissing bill*, p. 516.

Purchaser in possession, when ordered to pay purchase-money into Court, 516—allowed to elect either to pay or vacate possession, 517—quantity of land taken, when uncertain, no order made, *ib.*—under special circumstances, receiver appointed, 517, 518—or occupation-rent set on estate, 518—vendor-plaintiff seeking injunction, when obliged to pay in deposit, *ib.*—injunction against waste by purchaser in possession, *ib.*—against exercise by vendor of his legal rights, *ib.*—reference of title, on motion before hearing, 519—unless contract resisted on grounds other than title, *ib.*—frivolous defence, 520—objections to title, what are, *ib.*—order refused on ground of delay, 521—or waiver of title, *ib.*—conditional acceptance, *ib.*—order, subject-matter and form of, *ib.*—in suit commenced by claim, 522—proceedings on reference, 522, 523—purchaser need not accept doubtful or merely equitable title, 523—or consent to a case being sent to Law, *ib.*—as to doubtful titles, 524, 525—pendency of adverse suit, 525—adverse right not likely to be enforced, 526—outstanding interest, 527—report in favour of title and no exception, decree for plaintiff unless new matter appears, 528—exceptions taken; cause should also be set down on further directions, *ib.*—if exceptions allowed, a fresh reference will be directed at vendor's request, *ib.*—otherwise bill is dismissed, 529—exceptions overruled; purchaser how far precluded from other objections, *ib.*—report against title and no exceptions,

bill dismissed on motion, 530—exceptions taken and allowed; reference back, when directed, *ib.*—if no exceptions, decree will be made on hearing, if vendor can then remove objections, *ib.*—removal of objections, an answer to purchaser's motion to be discharged, 531—purchaser's general right to reference of title, how waived, *ib.*—purchaser, after great delay, not forced to take clearly bad title, *ib.*—decree for specific performance, its form, 532—plaintiff may take a decree adopting parol variation proved by defendant's agent, *ib.*—may elect to take defective title, 533—decree for specific performance no bar to adverse claims, *ib.*—plaintiff not allowed to take decree according to that construction of agreement which he had repudiated, *ib.*—defendant may take decree with parol variations of written contract offered by purchaser's bill, 534—parol variation proved by defendant, no decree for plaintiff, but defendant may take decree without cross bill, *ib.*—decree should direct accounts, &c., *ib.*—decree, in vendor's suit, may direct re-sale, and payment of the deficiency by purchaser, *ib.*—as to conveyance being settled by Master, 535—course of proceeding, 536, 537—conveyance under the Trustee Act, 1850, *ib.*—under 1 Will. IV. c. 65, in case of lunatic vendor, *ib.*—how to be obtained when party refuses to convey, *ib.*—interest on money refunded on appeal, not generally allowed, 538—decree dismissing vendor's bill, return of deposit when ordered, *ib.*

2. *As to costs*, p. 539.

Costs, unsuccessful litigant generally pays, 539—cases where general rule is allowed to operate, 540—cases where it is enforced with more than ordinary stringency, 541—cases where it is modified so as to deprive successful litigant of costs wholly or in part, *ib.*—cases where, in contravention of general rule, successful litigant is made to pay costs, 543—costs, when defendant submits to plaintiff's demand, 545—when defendant disclaiming is entitled to costs, 546—possession, how far important, *ib.*—deposit not set off against costs, 547—costs of case sent to Law, *ib.*—costs of action at Law, *ib.*—no interest payable on costs refunded, 548.

CHAPTER XIX.

AS TO SALES BY THE COURT OF CHANCERY.

1. *As to the time for, conduct of, and manner of the sale*, p. 549.

Sale is usually by auction, but may be by private contract, 549—when made in administration suit, *ib.*—may be made under 3 & 4 Will. IV. c. 104, in suit by person claiming under will, 550—in suits commenced by claim, *ib.*—who may bid at, *ib.*—who conducts, 551—Court, executing trust, cannot anticipate time thereby fixed for sale, *ib.*—sale may be in town or country, *ib.*—relative duties of vendors and purchasers prior to, 552—particulars and conditions; preparation, allowance, and nature thereof, *ib.*—payment of deposit, arrangement respecting, 553—advertisements, *ib.*—expenses, *ib.*—

highest bidding by a person incompetent, or of insufficient means, 553—bidding after estate bought in, 554—resale of lots remaining unsold, *ib.*

2. *As to the rights and liabilities of the highest bidder after the sale, but before confirmation of the Master's report, and as to opening bidding*, p. 554.

Highest bidder not the purchaser until Master's report confirmed; his rights in the interim, 554—death of, before confirmation, contract cannot be enforced against representatives without suit, 555—subsale at profit before confirmation, is for the benefit of the estate, *ib.*—until confirmation, biddings may be opened on sufficient advance in price, *ib.*—what advance sufficient, 556—several lots, 557—course of proceeding, *ib.*—deposit required, 558—first purchaser to be paid interest and costs, *ib.*—biddings may be reopened on neglect to pay in deposit, *ib.*—resale, *ib.*—first purchaser discharged by order opening biddings, 559—person opening biddings, if outbid at resale, is *primâ facie* discharged, *ib.*—when entitled to costs, *ib.*—opening biddings in fictitious name, *ib.*

3. *As to confirming the Master's report of the purchase, and as to the purchaser's rights and liabilities after confirmation*, p. 559.

How purchaser can confirm Master's report, 559—after confirmation, he is *primâ facie* entitled to estate, 560—may move to pay in his purchase-money, or to discharge incumbrances, 561—substitution of purchaser, *ib.*

4. *As to the investigation of the title, payment and application of purchase-money, possession, and preparation and execution of the conveyance*, p. 562.

Abstract, and title, 562—costs of reference, *ib.*—purchase-money may, under special circumstances, be paid in without accepting title, 564—as to its application and distribution, *ib.*—where the estate is encumbered, 565—if invested at purchaser's request, he takes proceeds of investment. if contract rescinded, 566—is entitled to possession, when, *ib.*—on purchase of life interest or life annuity, 567—as to the abstract, &c., *ib.*—conveyance, when to be settled by Master, *ib.*—executor of lessee entitled to indemnity from purchaser of leaseholds, *ib.*—purchaser may require concurrence of all necessary parties, 568—who are such, *ib.*—party refusing may be ordered to convey, *ib.*—against whom order will be made, *ib.*—party refusing may be declared a trustee, 569.

5. *Purchaser's rights after completion*, p. 569.

Purchaser, after conveyance executed, may claim deeds, 569—as to attested copies, 570—will be protected against all parties to the suit, *ib.*—unless Court exceeded its jurisdiction, *ib.*—allowed compensation for misdescription of estate, 571.

6. *The practice when the purchaser fails to complete*, p. 571.

Course to be adopted if purchaser refuse to complete, 571—if supposed to be irresponsible, 572—if supposed to be responsible, *ib.*—purchaser, whether allowed to forfeit deposit and abandon contract, 573.

TABLE OF CASES.

- Abbott *v.* Stratten, 111.
 Acland *v.* Gaisford, 294, 306.
 Acton *v.* Woodgate, 420, 424.
 Adams *v.* Barry, 197.
 ——— *v.* Blackwall Railway Company, 98,
 122, 460.
 ——— *v.* Broke, 496.
 ——— *v.* Heathcote, 517.
 ——— *v.* Lindsell, 101.
 Adamson *v.* Evitt, 42.
 Adderley *v.* Dixon, 459, 460.
 Addis *v.* Campbell, 354, 355, 356.
 Addison *v.* Walker, 204.
 Ahearne *v.* Hogan, 7, 15.
 Airth Earldom, 179.
 Aislabie *v.* Rice, 542.
 Aldborough, Lord, *v.* Trye, 357.
 Alder *v.* Boyle, 82.
 Aldrich *v.* Cooper, 241.
 Aldridge *v.* Westbrook, 565.
 Alexander, *Ex parte*, 16.
 ——— *v.* Crosby, 149, 153, 154, 217,
 233.
 ———, app.; Newman, resp., 113.
 Allan *v.* Bower, 480.
 Allen's Charities, *in re*, 553.
 ——— *v.* Aldridge, 342.
 ——— *v.* Allen, 2.
 ——— *v.* Anthony, 408.
 ——— *v.* Bennet, 102, 103.
 ——— *v.* Cameron, 452.
 ——— *v.* Knight, 391, 395, 411.
 ——— *v.* Martin, 216, 250.
 Alley *v.* Deschamps, 514.
 Alsop *v.* Lord Oxford, 201.
 Alvanley *v.* Kinnaird, 18, 304, 380, 484,
 485, 564.
 Alves *v.* Bunbury, 155.
 Ambrose *v.* Nott, 460.
 Anderson *v.* Higgins, 138.
 Anderton *v.* Arrowsmith, 375.
 Andrew *v.* Andrew, 528.
 Andrews *v.* Paradise, 367.
 Angell, *Ex parte*, 337.
 Angier *v.* Stannard, 38.
 Annesley *v.* Muggridge, 81, 446, 456.
 Anon. (cited 6 Ves. 632), 25.
 Anon. (cited 4 Taunt. 785), 40.
 ——— (Godb. 333), 368.
 ——— (Moore, 124), 370.
 ——— (Freem. Ch. R. 137), 408.
 ——— (cited 6 Ves. 24), 511.
 ——— (2 Ves. jun. 335), 554.
 ——— (2 Ves. jun. 286), 558.
 ——— (6 Ves. 513), 558.
 ——— (1 Ves. jun. 453), 560.
 ——— (Sug. 74), 564.
 ——— *v.* Collinge, 542.
 ——— *v.* Handcock, 2.
 ——— *v.* Walford, 470.
 Anson, Lord, *v.* Hodges, 538.
 ——— *v.* Lee, 112.
 ——— *v.* Towgood, 49, 555, 567.
 Anspach, Margravine of, *v.* Noel, 218, 521,
 531, 540.
 Apperton, *in re*, 270.
 Appleton *v.* Binks, 85, 414.
 ——— *v.* Campbell, 454.
 Archer *v.* Slater, 157.
 Archibald *v.* Wright, 394.
 Arkwright *v.* Gell, 184.
 Armiger *v.* Clarke, 494.
 Arnald *v.* Arnald, 122.
 Arnot *v.* Biscoe, 42.
 Ashby *v.* Ashby, 464.
 Atcherley *v.* Vernon, 127.
 Atherton, *in re*, 270.
 Att.-Gen. *v.* Backhouse, 392, 409, 410.
 ——— *v.* Brettingham, 7, 190.
 ——— *v.* Brown, 255, 328.
 ——— *v.* Christchurch, 294, 295.
 ——— *v.* Christ's Hospital, 394.
 ——— *v.* Lord Clarendon, 17.
 ——— *v.* Culverwell, 176.
 ——— *v.* Day, 91, 482, 501, 505,
 555.
 ——— *v.* Fishmongers' Company, 159.
 ——— *v.* Flint, 190, 392, 408.
 ——— *v.* Gardner, 321.
 ——— *v.* Glyn, 321.
 ——— *v.* Hall, 188.
 ——— *v.* Kerr, 190.
 ——— *v.* Lambe, 202.
 ——— *v.* Munro, 321.

- Att.-Gen. *v.* Newark, Corporation of, 7,
 563, 571.
 ——— *v.* Newcastle, Corporation of,
 420, 442.
 ——— *v.* Pargeter, 410.
 ——— *v.* Persse, 190.
 ——— *v.* Pilgrim, 591.
 ——— *v.* Plymouth, Corporation of, 7,
 682.
 ——— *v.* Sitwell, 34, 149, 304, 483.
 ——— *v.* South Sea Company, 7, 571.
 ——— *v.* Ward, 321.
 Attwood *v.* Small, 63.
 Aubrey *v.* Fisher, 61.
 Austin *v.* Chambers, 20.
 ——— *v.* Croome, 314.
 Avarne *v.* Brown, 132.
 Averall *v.* Wade, 394.
 Aylett *v.* Ashton, 463, 503.

 Back *v.* Andrews, 437, 438.
 Baggett *v.* Meux, 5.
 Bagshawe, *in re*, 340.
 Bailey *v.* Maule, 551.
 ——— *v.* Todd, 549.
 Baillie *v.* Jackson, 550.
 Baker *v.* Bent, 355.
 ——— *v.* Carter, 25.
 ——— *v.* Sowter, 570.
 ——— *v.* Wetton, 189.
 Baldwin *v.* Belcher, 115.
 ——— *v.* Peach, 162.
 Balfour *v.* Welland, 285, 286, 287.
 Ball *v.* Burnford, 420.
 ——— *v.* Harris, 292.
 Ballard *v.* Way, 53.
 Balls *v.* Margrave, 204.
 Bally *v.* Wells, 366.
 Balmanno *v.* Lumley, 503, 519.
 Bamford *v.* Bamford, 198.
 ——— *v.* Shuttleworth, 445.
 ——— *v.* Watts, 565.
 Bampton *v.* Birchall, 188.
 Banbury Peerage, 177.
 ———, Lord, *v.* Briscoe, 202.
 Bankin *v.* Hamilton, 453.
 Banner *v.* Jackson, 415.
 Barber, *in re*, 272.
 Barclay *v.* Raine, 263, 362.
 Bardell *v.* Spinks, 45.
 Barfield *v.* Rogers, 569.
 Barker *v.* Greenwood, 87, 310.
 ——— *v.* Harrison, 15, 492.
 ——— *v.* North Staffordshire Railway Com-
 pany, 225.
 ——— *v.* Richardson, 160.
 ——— *v.* Smark, 351.
 ——— *v.* Vansommer, 358.
 Barnes *v.* Racster, 428.
 Barnes *v.* Stuart, 182.
 Barraud *v.* Archer, 53, 406.
 Barrett *v.* Rolfe, 92.
 Barrington, *Ex parte*, 459.
 Bartlett *v.* Pickersgill, 437.
 ——— *v.* Tuchin, 457.
 ——— *v.* Vinor, 454.
 Barton *v.* Dawes, 258.
 ——— *v.* Fitzgerald, 373.
 Bass *v.* Wellsted, 252.
 Batchelor *v.* Middleton, 196.
 Bates *v.* Bonnor, 556, 557, 558.
 Battersbee *v.* Farrington, 426.
 Battersby *v.* Rochfort, 401.
 Baugh *v.* Price, 23.
 Bawtree *v.* Watson, 355, 359.
 Baylies *v.* Baylies, 490.
 Baylis *v.* Newton, 439.
 ——— *v.* Usher, 455.
 Baynton, *Ex parte*, 17.
 Beadon *v.* King, 415.
 Beale, *in re*, 341.
 Beatson *v.* Nicholson, 480.
 Beaufort, Duke of, *v.* Phillips, 535.
 ——— *v.* Mayor of Swansea,
 167.
 Beaumont *v.* Bramley, 352.
 Becke and Flower, *in re*, 342.
 Beckett *v.* Cordley, 393.
 Beckford *v.* Beckford, 437.
 Bedford, Duke of, *v.* Trustees of British
 Museum, 362.
 ——— *v.* Bacchus, 400.
 ——— *v.* Forbes, 241.
 Beech, *in re*, 569.
 Beere *v.* Head, 241.
 Beete *v.* Bidgood, 327.
 Beevor *v.* Simpson, 215.
 Belchier *v.* Renforth, 391.
 Bellamy *v.* Liversidge, 468.
 ——— *v.* Sabine, 354, 357, 358, 493.
 Bellasis, Lady, *v.* Compton, 436.
 Bellringer *v.* Blagrove, 490.
 Benbow *v.* Townsend, 441.
 Bennet's case, 371.
 Bennet *v.* Lord Tankerville, 123.
 Bennett, *ex parte*, 16, 17, 18, 19, 23, 84,
 459.
 ———, *in re*, 340, 342.
 ——— *v.* Colley, 25.
 ——— *v.* Cooper, 385.
 ——— *v.* Fowler, 533, 544.
 ——— *v.* Rees, 519, 521, 522.
 Bensley *v.* Burdon, 385.
 Benson *v.* Glastonbury Canal Company,
 517.
 ——— *v.* Lamb, 212, 250.
 Bentinck *v.* Willink, 257.
 Berisford *v.* Milward, 228, 394.

- Berkeley Peerage Case, 178, 179.
 Birmingham *v.* Burke, 376.
 Berry *v.* Armistead, 378.
 ——— *v.* Johnson, 563.
 ——— *v.* Young, 146, 315, 316, 449, 456.
 Bevan *v.* Bevan, 564.
 Beverley's case, 3, 4.
 ———, Mayor of, *v.* Craven, 154.
 Bickerton *v.* Burrell, 444.
 Bickford *v.* Parson, 387.
 Bignold, *in re*, 341, 342.
 ——— *v.* Audland, 81.
 Billing *v.* Webb, 270, 569.
 Bingham *v.* Bingham, 382.
 Binks *v.* Lord Rokeby, 294, 295, 469, 506, 509.
 Birce *v.* Bletchley, 471.
 Birch, *in re*, 558, 573.
 ——— *v.* Podmore, 299.
 ——— *v.* Wright, 386.
 Bird *v.* Boulter, 82, 83.
 ——— *v.* Higginson, 92.
 Bisco *v.* Earl of Banbury, 407.
 Biscoe *v.* Wilks, 525, 541.
 Blachford *v.* Kirkpatrick, 478, 531.
 Blackbeard *v.* Lindgren, 554.
 Blackburn *v.* Gregson, 345.
 ——— *v.* Scholes, 81, 86.
 ——— *v.* Smith, 11, 131, 444.
 ——— *v.* Stace, 516.
 Blacklow *v.* Laws, 30, 58, 73, 217, 521, 551, 571.
 Blackston *v.* Morland, 325.
 Blackwell, *in re*, 569.
 Blackwood *v.* Borrowes, 30.
 Blagden *v.* Bradbear, 83, 91, 98, 101, 482.
 Blair *v.* Bromley, 190, 469.
 ——— *v.* Nugent, 190, 192.
 ——— *v.* Ormond, 111, 161, 453.
 Blake, *in re*, 569.
 ——— *v.* Phinn, 67.
 Blakesley *v.* Whieldon, 266, 535.
 Blakey *v.* Porter, 453.
 Blandy *v.* Herbert, 327.
 Bleakley *v.* Smith, 101, 106.
 Blenkinsopp *v.* Blenkinsopp, 414.
 Blennerhasset *v.* Day, 16.
 Blomfield *v.* Eyre, 426, 427.
 Blore *v.* Sutton, 106.
 Blossé *v.* Lord Clanmorris, 523, 524.
 Bloye's Trust, *in re*, 15, 17, 18, 22.
 Blundell *v.* Stanley, 181.
 Blyth *v.* Elmhirst, 520.
 Boardman *v.* Mostyn, 480.
 Bodington *v.* Great Western Railway Company, 213.
 Boehm *v.* Wood, 210, 495, 634.
 Bolingbroke, Lord, case of, 498.
 Bond *v.* Kent, 346.
 ——— *v.* Warden, 311.
 Boothby *v.* Boothby, 355.
 Borell *v.* Dann, 77, 78, 410, 510, 511.
 Boswell *v.* Mendam, 76.
 Boughton *v.* Jewell, 65, 66, 315.
 Bourn *v.* Bourn, 556.
 Bousfield *v.* Godfrey, 111, 453.
 Bowen *v.* Evans, 25, 392, 571.
 Bower *v.* Cooper, 51, 266, 511, 545.
 Bowles *v.* Rogers, 121, 345.
 ——— *v.* Round, 40, 52, 510.
 Boxmoor Trustees, *ex parte*, 339.
 Boyce *v.* Greene, 93, 100, 102.
 Boyd *v.* Belton, 394.
 Boydell *v.* Drummond, 102.
 Boyes *v.* Liddell, 213, 520.
 Bracey, *in re*, 340.
 ——— *v.* Earl of Scarborough, 552.
 Bradley *v.* Holdsworth, 93.
 Bradshaw, *ex parte*, 299, 337.
 Bradstock, *ex parte*, 251.
 Braithwaite *v.* Britain, 289.
 Branch *v.* Browne, 569.
 Brandlyn *v.* Ord, 425.
 Brandon *v.* Woodthorpe, 175.
 Branmer's Estate, *in re*, 338.
 Brasier *v.* Hudson, 292.
 Braybrooke, Lord, *v.* Inskip, 131, 132.
 Braye Peerage, 157, 167.
 Brazier *v.* Hudson, 275.
 Brealey *v.* Collins, 44, 510.
 Breedon *v.* Breedon, 285.
 Breeze *v.* Hawker, 150.
 Brennan *v.* Bolton, 478.
 Brett *v.* Ellis, 446, 447.
 Brewster *v.* Kitchen, or Kidgil, 378.
 Bridges *v.* Wilts S. & W. Railway Company, 225.
 Bright *v.* Walker, 184, 185, 186.
 Brinkley *v.* Hann, 492.
 Bristow *v.* Wood, 362.
 Brocklebank *v.* Whitehaven Junction Railway Company, 29.
 Brodie *v.* St. Paul, 102, 453.
 Brook *v.* Rawl, 47.
 Brooke *v.* Anon. 529.
 ——— *v.* Champenowne, 295, 302.
 ——— *v.* Hewitt, 120.
 ———, Lord, *v.* Routhwaite, 44, 65.
 Brooker *v.* Collier, 552.
 Brookfield *v.* Bradley, 556.
 Broome *v.* Monck, 125, 126, 470.
 Brothers *v.* Bence, 412.
 Broughton *v.* Conway, 373.
 ——— *v.* Lashmar, 543.
 Brown *v.* Carter, 424.
 ——— *v.* Cole, 133, 276.
 ——— *v.* Jones, 420, 421.

- Brown *v.* Perrott, 238.
 ——— *v.* Pringle, 175.
 ——— *v.* Raindle, 462.
 ——— *v.* Stead, 430.
 Browne *v.* Amyot, 386.
 ——— *v.* Fenton, 63.
 ——— *v.* Lake, 335, 567.
 ——— *v.* Lockhart, 204.
 Browning *v.* Wright, 371, 373.
 Bruce, *in re*, 274.
 Brunton *v.* Neale, 233, 462.
 Bryan *v.* Lewis, 494.
 Bryant *v.* Busk, 65, 142, 152, 538, 540.
 Buckinghamshire Railways, *in re*, 313.
 Buckland *v.* Pocknell, 349.
 Buckle *v.* Mitchell, 462.
 Buckley *v.* Lanauze, 402.
 Buckmaster *v.* Harrop, 125, 470, 477, 482.
 Bugden *v.* Bignold, 43, 228, 393, 410.
 Bull *v.* Price, 86.
 Bullen *v.* Denning, 62.
 Bullin *v.* Fletcher, 127.
 Bullock *v.* Thorne, 425.
 Bulmer *v.* Alison, 572, 573.
 Bulteel *v.* Lord Abinger, 32.
 Burch *v.* Coney, 376.
 Burke *v.* Smith, 415.
 Burnell, *Ex parte*, 16.
 ——— *v.* Brown, 52, 219, 506, 508, 540.
 Burrell's Case, 424.
 Burrell *v.* Lord Egremont, 198.
 Burrough *v.* Skinner, 82.
 Burroughs *v.* McCreight, 200.
 ——— *v.* Oakley, 219, 220, 521.
 Burrowes *v.* Lock, 43, 45, 229, 510, 543.
 Burton *v.* Todd, 306, 541.
 Bury *v.* Philpot, 169, 170.
 Butcher *v.* Stapely, 403.
 Butler *v.* Borton, 33.
 ——— *v.* Lord Portarlington, 407, 409.
 ——— *v.* Powis, 494, 496, 499.
 ——— *v.* Swinerton, 368.
 Buttemer *v.* Hayes, 92.
 Buxton, *ex parte*, 37.
 ——— *v.* Buxton, 29.
 ——— *v.* Lister, 44, 485, 541, 542.
 Cadman *v.* Horner, 492, 510.
 Caines *v.* Smith, 449.
 Calcraft *v.* Roebuck, 219, 221, 308, 508.
 Calverly *v.* Williams, 485.
 Calvert *v.* Godfrey, 2, 535, 563, 567, 571.
 Cambridge, Corporation of, *ex parte*, 311.
 Camden *v.* Benson, 562.
 Camoys Barony, 178.
 Campbell *v.* Campbell, 316.
 ——— *v.* Walker, 22, 25, 26.
 Cane *v.* Lord Allen, 16.
 Cann's Estate, *in re*, 313
 Cann *v.* Cann, 26, 523, 571.
 Canterbury, *in re* the Archbishop of, 313.
 Capel *v.* Girdler, 128.
 Capper *v.* Spottiswoode, 346.
 ——— *v.* Terrington, 315.
 Carew, *in re*, 340.
 Carleton *v.* Leighton, 385.
 Carlon *v.* Farlar, 236.
 Carne *v.* Michell, 498.
 Carolan *v.* Brabazon, 490, 514.
 Carpenter *v.* Heriot, 26.
 Carpmael *v.* Powis, 353, 414.
 Carr, *ex parte*, 43, 45, 270.
 ——— *v.* Foster, 187.
 Carrington *v.* Roots, 93.
 Carter *v.* Dean of Ely, 209.
 ——— *v.* Horne, 434.
 ——— *v.* Palmer, 15, 17, 22.
 Carven, *in re*, 342.
 Casamajor *v.* Strode, 161, 168, 506, 508.
 Casey *v.* O'Shaunessy, 177.
 Cass *v.* Waterhouse, 383.
 Cator *v.* Lord Pembroke, 382.
 Cattell *v.* Corral, 51, 68, 133, 136, 321.
 Cattlin, *in re*, 341.
 Cavan, Lady, *v.* Pulteney, 369.
 Cave *v.* Cork, 468.
 Cawthorne, *ex parte*, 393.
 Chadwick *v.* Broadwood, 193.
 Chalmer *v.* Bradley, 25, 26, 159.
 Chamberlain *v.* Lee, 495, 530.
 Chambers *v.* Howell, 288.
 Champernowne *v.* Brooke, 295.
 Champion *v.* Plummer, 100.
 Chandos, Duke of, *v.* Talbot, 61.
 Chant *v.* Brown, 415.
 Chaplain *v.* Southgate, 368.
 Chapman *v.* Fowler, 559.
 Charter *v.* Trevelyan, 15, 25.
 Cheese *v.* Cheese, 535, 567.
 Cheval *v.* Nichols, 400.
 Chillingworth *v.* Chillingworth, 327, 572.
 Cholmley *v.* Paxton, 33.
 Christ's Hospital *v.* Budgin, 438.
 Christian *v.* Chambers, 561.
 ——— *v.* Devereux, 197.
 Church *v.* Brown, 259.
 Clapham *v.* Shillito, 44, 63, 492.
 Clare *v.* Earl of Bedford, 228, 394.
 ——— *v.* Maynard, 447.
 ——— *v.* Wood, 238.
 Clare Hall *v.* Harding, 395, 426.
 Clark *v.* Burgh, 464.
 ——— *v.* Seymour, 30, 35.
 Clarke *v.* Elliott, 517.
 ——— *v.* Faux, 67.
 ——— *v.* Grant, 483, 486.
 ——— *v.* Maynard, 170.
 ——— *v.* Moore, 515.

- Clarke *v.* Royle, 347, 348, 349.
 Clarkson *v.* Woodhouse, 141, 167.
 Clay *v.* Rufford, 484.
 — *v.* Sharpe, 250, 466.
 — *v.* Shackeray, 186.
 Clayton *v.* Ashdown, 489.
 — *v.* Corby, 186, 187.
 — *v.* Earl Winton, 423.
 — *v.* Gregson, 452.
 Clegg *v.* Fishwick, 434.
 Clermont *v.* Tasburgh, 492, 503.
 Clifford *v.* Turrell, 359, 424, 460.
 Clinan *v.* Cooke, 102, 453, 477, 478, 480, 484.
 Clinton *v.* Bernard, 568.
 Clive *v.* Beaumont, 104, 218, 471, 532.
 Close *v.* Phipps, 34.
 — *v.* Wilberforce, 129, 265.
 Clowes *v.* Higginson, 50, 483, 485, 486, 533.
 Cochrane *v.* Robinson, 265, 567.
 Cockerell *v.* Cholmeley, 33.
 — *v.* Dickens, 472.
 Cocking *v.* Ward, 93.
 Cockman *v.* Farrer, 168.
 Coffin *v.* Cooper, 495, 531.
 Colclough *v.* Sterum, 571.
 Cole *v.* Coles, 28, 396.
 Coleman *v.* Upcot, 100, 494.
 Coles *v.* Kinder, 370.
 — *v.* Trecothick, 15, 20, 21, 87, 98, 102, 107, 354, 510, 511.
 Collard, *in re*, 523.
 Collett *v.* Thompson, 456.
 — *v.* Hover, 466, 469.
 Collier *v.* Jenkins, 126, 505.
 Collins *v.* Archer, 392.
 — *v.* Greaves, 522.
 — *v.* Maule, 153.
 Colpoys *v.* Colpoys, 452, 453.
 Colquhoun, *in re*, 340.
 Colton *v.* Wilson, 468, 469.
 Colyer *v.* Clay, 492.
 Connell *v.* Hardie, 556.
 Cood *v.* Cood, 347.
 — *v.* Pollard, 350.
 Cook *v.* Field, 490.
 Cooke, *ex parte*, 242, 337.
 — *v.* Brown, 565.
 — *v.* Burtchaell, 355, 357.
 — *v.* Clayworth, 489.
 — *v.* Cooke, 467.
 — *v.* Farrand, 33.
 — *v.* Soltau, 160.
 — *v.* Tombs, 99.
 Cooper, *ex parte*, 121.
 — *v.* Emery, 65, 66, 138, 165, 263, 264, 316.
 — *v.* Ewart, 340.
 — *v.* Norfolk Railway Company, 324.
 Cooper *v.* Smith, 100.
 Coort, *ex parte*, 18.
 Cooth *v.* Jackson, 98, 482, 483, 490.
 Cope *v.* Parry, 467.
 — *v.* Thames Haven Company, 83, 108.
 Coppin *v.* Fernyhough, 138, 407.
 — *v.* Gray, 188.
 Corder *v.* Morgan, 28, 250, 466.
 Cork and Bandon Railway Company *v.* Cazenove, 10.
 Cornfoot *v.* Fowke, 40, 454.
 Corral *v.* Cattell, 68.
 Coslake *v.* Till, 209.
 Cosser *v.* Collinge, 408.
 Costello, *in re*, 554.
 Costigan *v.* Hastler, 491.
 Cothay *v.* Sydenham, 411.
 Cotman *v.* Orton, 310.
 Cotterell *v.* Homer, 422.
 Cottrell *v.* Watkins, 142, 530.
 Coulton *v.* Ambler, 94.
 Cousens *v.* Harris, 181.
 Coussmaker *v.* Sewell, 142.
 Coverley, *in re*, 271.
 Coverley *v.* Burrell, 52, 504.
 Cowgill *v.* Lord Oxmantown, 530.
 Cox *v.* Allingham, 157.
 — *v.* Chamberlain, 541.
 — *v.* King, 377.
 Crabb *v.* Crabb, 438.
 Craddock *v.* Piper, 250, 562, 568.
 Cragg *v.* Holme, 489.
 Craven, *ex parte*, 313.
 Crawford, *in re*, 272.
 Creagh *v.* Blood, 159.
 Crease *v.* Barrett, 177.
 Cripps *v.* Jee, 437.
 — *v.* Reade, 282.
 Crisp *v.* Platel, 204.
 Crober, *ex parte*, 337.
 Crockford *v.* Alexander, 118, 518.
 Crofton *v.* Ormsby, 416.
 Cromack *v.* Heathcote, 414.
 Croome *v.* Lediard, 486, 544.
 Crop *v.* Norton, 498.
 Crosby *v.* Wadsworth, 94.
 Crossfield *v.* Morrison, 372.
 Croughton *v.* Blake, 152.
 Crowther *v.* Solomons, 111.
 Crutchley *v.* Jermingham, 87.
 Cud *v.* Rutter, 459.
 Cuddon, *ex parte*, 18, 32, 37.
 Culley *v.* Doe dem. Taylerson, 193.
 Culpepper *v.* Aston, or Austin, 289.
 Cunningham *v.* Williams, 572.
 Curling *v.* Flight, 138, 519, 520, 528, 529.
 Currant *v.* Jago, 437, 439.
 Curre *v.* Bowyer, 123.
 Currie, *in re*, 340, 341.

- Currie *v.* Nind, 420.
 Curtis *v.* Marquis of Buckingham, 518.
 Custance *v.* Bradshaw, 433.
 Cuthbert *v.* Purrier, 172, 173.
 Cutts, *ex parte*, 91, 459, 482.
 — *v.* Thodey, 72, 462, 469.
 Dakin *v.* Cope, 297, 542.
 Dalby *v.* Pullen, 495, 505, 530, 551.
 Dale *v.* Hamilton, 433, 434, 435, 477, 478, 479, 480.
 — *v.* Lister, 501, 503.
 Daly, *ex parte*, 272.
 Damer *v.* Earl of Portarlington, 204, 545.
 Damerell *v.* Protheroe, 53.
 Daniel *v.* Adams, 31, 84.
 Daniels *v.* Davison, 119, 229, 408, 462, 469.
 Danks, *ex parte*, 18.
 Dare *v.* Tucker, 66, 263, 315, 316.
 Darkin *v.* Marye, 561.
 Darling, *in re*, 272.
 Darwin *v.* Upton, 160.
 Davenport *v.* Bishopp, 259, 421.
 Davidson *v.* Gardner, 21, 463.
 Davies *v.* Cooper, 42, 46, 118, 355, 511.
 — *v.* Davies, 404.
 — *v.* Lowndes, 178, 179.
 — *v.* Thomas, 390, 407.
 Davis *v.* Earl of Strathmore, 400, 402.
 — *v.* Symonds, 541.
 Davy *v.* Barber, 295.
 — *v.* Maltwood, 272.
 Dawes *v.* Betts, 49, 54, 528, 529, 530, 531.
 — *v.* King, 44.
 Dawson *v.* Dawson, 99, 561.
 Day *v.* Newman, 512.
 Deane *v.* Rastron, 510.
 Dearman *v.* Wyche, 198.
 De Begnis *v.* Armistead, 454, 490.
 De Beil *v.* Thomson, 86.
 De Wall's Case, 10.
 Delabere *v.* Norwood, 466.
 De Montmorency *v.* Devereux, 26.
 De Visme *v.* De Visme, 59, 60, 294, 300, 301, 302, 564.
 Dempsey *v.* Dempsey, 564.
 Denn *v.* Diamond, 328.
 Denning *v.* Henderson, 59, 299, 564.
 Dent *v.* Bennett, 7.
 — *v.* Rob, 182.
 Denys *v.* Shuckburgh, 193.
 Deverell *v.* Lord Bolton, 149, 216, 217, 542.
 Dewhirst *v.* Wrigley, 161, 185.
 Dick *v.* Donald, 67.
 Dicker *v.* Jackson, 450.
 Dickenson *v.* Dickenson, 291.
 — *v.* Shaw, 438.
 Dickinson *v.* Heron, 298.
 Dike *v.* Ricks, 289.
 Dinning *v.* Henderson, 550.
 Dixon, *in re*, 271.
 — *v.* Astley, 221, 516.
 — *v.* Pyner, 551.
 Dobell *v.* Hutchinson, 64, 457.
 Doe *v.* Allsop, 400.
 — *v.* Angell, 193.
 — *v.* Archer, 417.
 — *v.* Barnard, 200.
 — *v.* Barnes, 176.
 — *v.* Benham, 192.
 — *v.* Benson, 452.
 — *v.* Birch, *ib.*
 — *v.* Bold, 191.
 — *v.* Bramston, 194.
 — *v.* Brydges, 150, 152.
 — *v.* Burt, 452.
 — *v.* Caperton, 151, 222, 449.
 — *v.* Carter, 191, 192.
 — *v.* Chamberlaine, 222, 249.
 — *v.* Clifford, 153.
 — *v.* Coombs, 111, 161.
 — *v.* Coulthred, 167.
 — *v.* Davies, 179, 180.
 — *v.* Edmonds, 189, 192, 193.
 — *v.* Evans, 112.
 — *v.* Freeman, 150, 151.
 — *v.* Grazebrook, 171.
 — *v.* Groves, 191.
 — *v.* Hampson, 168.
 — *v.* Lord Hertford, 414.
 — *v.* Hinde, 192.
 — *v.* Horrocks, 193.
 — *v.* Jones, 200, 249.
 — *v.* Keeling, 247.
 — *v.* Langton, 452.
 — *v.* Lightfoot, 189.
 — *v.* Liversedge, 194.
 — *v.* Manchester, Bury, and Rossendale Railway Company, 276.
 — *v.* Martin, 454.
 — *v.* Monro, 321.
 — *v.* Moore, 192.
 — *v.* Morgan, 453.
 — *v.* Moulds, 193, 194, 249.
 — *v.* Needs, 453.
 — *v.* Nepean, 173.
 — *v.* Oxenham, 193.
 — *v.* Page, 191.
 — *v.* Pedgriph, 107.
 — *v.* Penfold, 168.
 — *v.* Perkins, 42.
 — *v.* Phillips, 152, 191, 332, 399.
 — *v.* Price, 155, 248, 249.
 — *v.* Roberts, 200.
 — *v.* Rock, 191, 222.
 — *v.* Roe, 420.

- Doe *v.* Rolfe, 421, 423.
 — *v.* Ross, 154.
 — *v.* Sayer, 120, 449.
 — *v.* Smith, 11.
 — *v.* Stanion, 119, 120, 449.
 — *v.* Sumner, 192, 200.
 — *v.* Tarver, 180.
 — *v.* Thompson, 191, 419.
 — *v.* Turner, 191.
 — *v.* Waterton, 162.
 — *v.* Webster, 353.
 — *v.* Westlake, 453.
 — *v.* Weston, 330.
 — *v.* Woodroffe, 193.
 — *v.* Woodward, 399.
 Dobell *v.* Hutchinson, 102, 457.
 Doloret *v.* Rothschild, 209.
 Domville *v.* Berrington, 550, 556.
 Donations, Commissioners of, *v.* Wybrants, 190.
 Donellan *v.* Read, 95.
 Donohoe *v.* Conrahy, 435.
 Donovan *v.* Fricker, 220, 222, 223, 380, 381, 426.
 Doo *v.* London and Croydon Canal Company, 99.
 Doran *v.* Wiltshire, 285.
 Dorin *v.* Harvey, 519, 521.
 Doughty *v.* Bowman, 361.
 Douglas *v.* Whitteronge, 408.
 Dowell *v.* Dew, 416, 463, 464, 477, 494.
 Dowle *v.* Lucy, 549, 554.
 Dowley *v.* Winfield, 172, 173, 174.
 Downes, *in re*, 342.
 — *v.* Grazebrook, 18, 22, 25, 33.
 Downman *v.* Jones, 85, 445.
 Drake, *in re*, 340.
 Drant *v.* Vause, 124.
 Draper *v.* Borlace, 394.
 Drew, *in re*, 340.
 — *v.* Earl of Norbury, 344, 406.
 Drewe *v.* Corp, 504.
 — *v.* Hanson, 508.
 Driver *v.* Cholmondeley, 82.
 Druce *v.* Denison, 464.
 Drury *v.* Man, 335.
 Dryden *v.* Frost, 346, 408, 411, 413.
 Duckle *v.* Baines, 126.
 Dudley *v.* Folliott, 367.
 Duffield *v.* Scott, 375.
 Duffill, *ex parte*, 274.
 Du Hourmelin *v.* Sheldon, 8.
 Duke *v.* Barnett, 67, 68.
 Dummer *v.* Fitcher, 438, 440.
 Duncuft *v.* Albrecht, 93, 459.
 Dundas *v.* Dutens, 479.
 Dunlop *v.* Higgins, 101, 105.
 Dunsany, *in re*, 272.
 Dunsmore *v.* Boulderson, 173.
 Dutch *v.* Warren, 444.
 Du Vigier *v.* Lee, 198, 199.
 Dyas *v.* Cruise, 501.
 Dyer *v.* Dyer, 436, 438, 439.
 — *v.* Hargrave, 63, 297, 309, 508,
 — *v.* Pulteney, 115.
 Dykes *v.* Blake, 54, 55, 64.
 — *v.* Taylor, 550.
 Eady, *in re*, 272.
 Earl *v.* Baxter, 160.
 Early *v.* Garrett, 378.
 Eastern Counties Railway Company *v.*
 Tuffnell, 336.
 East Grinstead Case, 394, 403, 425.
 East India Company *v.* Clavel, 425.
 — *v.* Vincent, 395.
 Eaton *v.* Sanxter, 233, 290.
 Ebrand *v.* Dancer, 437.
 Echliif *v.* Baldwin, 469, 518.
 Edden *v.* Read, 445.
 Ede *v.* Knowles, 419, 426.
 Eden *v.* Earl of Bute, 452.
 Edmonds *v.* Peake, 82.
 Edward *v.* Harvey, 540.
 Edwards *v.* Browne, 355, 356, 357.
 — *v.* Fidel, 436.
 — *v.* M'Leay, 41, 222, 378, 380.
 — *v.* Meyrick, 20.
 Egerton *v.* Jones, 528.
 Egremont, Lord, *in re*, 311.
 Eland *v.* Eland, 284, 286, 287, 288, 289.
 Ellard *v.* Lord Llandaff, 46, 499.
 Elliot *v.* Brown, 433.
 — *v.* Edwards, 350.
 — *v.* Elliot, 439, 440.
 — *v.* Meriman, 291.
 — *v.* South Devon Railway Company, 359.
 Elliott *v.* Turner, 299, see errata, 337.
 Ely, Dean and Chapter of, *v.* Cash, 183, 188.
 — *v.* Bliss, 183, 188, 193.
 Elworthy *v.* Billing, 550.
 Elwyn *v.* Williams, 464.
 Emanuel *v.* Danc, 454.
 Emery *v.* Grocock, 159, 162, 166.
 — *v.* Pickering, 519.
 — *v.* Wase, 463, 498.
 Emmerson *v.* Heelis, 83, 107, 109.
 Enraght *v.* Fitzgerald, 295.
 Esdaile *v.* Oxenham, 267, 345.
 — *v.* Stephenson, 508, 527, 530.
 — *v.* Stevenson, 59, 294, 299.
 Esron *v.* Nicholas, 3, 395.
 Essex *v.* Baugh, 319, 320, 400, 401.
 Estcourt *v.* Kingscote, 182.
 Eton College, *ex parte*, 337.

- Evans *v.* Bagwell, 190.
 ——— *v.* Bicknell, 6, 43, 393, 395, 411.
 ——— *v.* Jackson, 467.
 ——— *v.* Llewellyn, 353, 492.
 ——— *v.* Roberts, 94.
 ——— *v.* Upsher, 336.
 Evelyn *v.* Templar, 420.
 Ewing *v.* Osbaldiston, 454, 490.
 Ewer *v.* Corbet, 288.
 Exeter, Marquis of, *v.* The Marchioness, 352.
 Eyre, *in re*, 340.
 Eyston *v.* Simonds, 495.

 Fagan, *in re*, 271.
 Fain *v.* Ayers, 203.
 Faine *v.* Brown, 491.
 Fairbrother *v.* Prattent, 81.
 Falmouth, Lord, *v.* Thomas, 94, 95, 96.
 Fane *v.* Spencer, 137.
 Farebrother *v.* Simmons, 83, 84.
 Farlow *v.* Wieldon, 556, 558.
 Farmer *v.* Farmer, 353, 357, 359.
 ——— *v.* Robinson, 86.
 Farrar *v.* Lord Winterton, 124, 334.
 Farrer *v.* Nightingal, 444.
 Farrow *v.* Rees, 395, 404, 543.
 Faulkner *v.* Daniel, 197.
 Fawell *v.* Heelis, 345.
 Featherstonhaugh *v.* Fenwick, 434.
 Fellowes *v.* Clay, 183.
 ——— *v.* Lord Gwydyr, 496.
 Fenner *v.* Hepburn, 245, 461.
 Fennings *v.* Humphrey, 460.
 Fenton *v.* Browne, 43, 44, 542.
 Feoffees of Heriot's Hospital *v.* Gibson, 55.
 Fergus, Executors of, *v.* Gore, 560.
 Ferraby *v.* Hobson, 20.
 Ferrars *v.* Cherry, 407.
 Fewster *v.* Turner, 55, 309, 545.
 Field *v.* Churchill, 543.
 ——— *v.* Hutchinson, 471.
 Fielder *v.* Fielder, 557.
 ——— *v.* Higginson, 544, 563.
 Fife *v.* Clayton, 534.
 Filder *v.* Bellingham, 559.
 Fildes *v.* Hooker, 67, 528, 529.
 Finch *v.* Finch, 437, 440.
 Firmin *v.* Pullin, 540.
 Fisher *v.* Dudding, 234.
 Fitch *v.* Weber, 9.
 Fitzwalter Peerage, 65, 152, 157, 178.
 Flather *v.* Stubbs, 110.
 Fleetwood *v.* Green, 521, 531, 540.
 Flight *v.* Barton, 41, 54.
 ——— *v.* Bentley, 386.
 ——— *v.* Bolland, 489.
 ——— *v.* Booth, 53, 62, 64.
 ——— *v.* Thomas, 186, 187.
 Flower *v.* Hartopp, 69, 527, 529, 563.

 Flower *v.* Walker, 523.
 Fludyer *v.* Cocker, 295.
 Flureau *v.* Thornhill, 446, 447.
 Foljambe, *in re*, 341.
 Follett *v.* Jefferies, 415.
 Fooks *v.* Wilts, S. & W. Railway Comp., 224.
 Foord *v.* Wilson, 373.
 Forbes *v.* Peacock, 132, 284, 285, 286, 287, 288, 547.
 Fordyce *v.* Ford, 504, 508.
 Forster *v.* Hale, 435.
 ——— or Foster, *v.* Hoggart, 34, 182.
 Fort *v.* Clarke, 180.
 Forteblow *v.* Shirley, 52, 221, 294, 506.
 Foster, *in re*, 270, 272.
 ——— *v.* Bates, 86.
 ——— *v.* Charles, 46.
 ——— *v.* Deacon, 306, 307.
 ——— or Forster *v.* Hoggart, 34, 132.
 ——— *v.* Leonard, 61.
 ——— and Wilson *v.* Mapes, 368.
 Fountain *v.* Young, 414.
 Fourdrin *v.* Gowdey, 8, 9.
 Fowle *v.* Freeman, 105.
 Fowler *v.* Ward, 517.
 Fox *v.* Mackreth, 22, 46.
 — *v.* Wright, 357.
 Foxlowe *v.* Amcoats, 519.
 Frame *v.* Dawson, 479.
 Frampton *v.* Frampton, 420.
 Francis, *ex parte*, 270.
 ——— *v.* Grover, 190, 198, 199.
 ——— *v.* Wigzell, 463, 465.
 Frank *v.* Mainwaring, 463.
 Franklyn *v.* Lamond, 80.
 ———, *ex parte*, 313.
 Fraser *v.* Wood, 530.
 Frazer *v.* Jones, 417.
 Freeman *v.* Cooke, 46.
 ——— *v.* Fairlie, 257.
 Freer *v.* Rimner, 57.
 Freme *v.* Wright, 67.
 Frost *v.* Brewer, 308.
 Fry *v.* Porter, 403.
 Fruhling *v.* Schroeder, 445.
 Fuller *v.* Bennett, 413.
 ——— *v.* Wilson, 380.
 Fulham *v.* M'Carthy, 466, 467, 469, 470.
 Fursdon *v.* Clogg, 192.
 Fyson, *in re*, 340, 342.

 Gabriel *v.* Sturgis, 465, 546.
 Gainsford *v.* Griffith, 373.
 Gait *v.* Osbaldeston, 392.
 Gaitskell, *in re*, 340.
 Galton *v.* Emuss, 47, 490.
 ——— *v.* Hancock, 128.
 Ganvill *v.* Utting, 168.
 Garbrand *v.* Allen, 12.

- Gardiner *v.* Fell, 257.
 Gardner, *ex parte*, 213.
 Garmstone *v.* Gaunt, 2, 571.
 Garrard *v.* Grimling, 484.
 ——— *v.* Lord Lauderdale, 420.
 ——— *v.* Tuck, 160, 191.
 Garrick *v.* Lord Camden, 116, 567.
 Gaskarth *v.* Lord Lowther, 126, 494.
 Gaslight Company *v.* Turner, 454, 490.
 Gaston *v.* Frankum, 465, 471.
 Gee, *in re*, 205.
 ——— *v.* Pearse, 88, 515, 539, 542, 547.
 Geldard *v.* Randall, 551.
 Gell *v.* Watson, 308.
 George *v.* Milbanke, 424.
 Gerahty *v.* Malone, 539.
 Gerrard *v.* O'Reilly, 359.
 Ghost *v.* Waller, 310.
 Gibbins *v.* N. E. Metropolitan Asylum,
 104, 105, 532.
 Gibbons *v.* Howell, 558.
 Gibson *v.* Clark, 159.
 ——— *v.* D'Este, 41, 54, 64, 378, 379,
 380, 381.
 ——— *v.* Ingo, 404, 409.
 ——— *v.* Russell, 7.
 ——— *v.* Spurrier, 52.
 Gigner *v.* Bayly, 453.
 Gilbert *v.* Wetherell, 556.
 Giles *v.* Homes, 30.
 Gill, *ex parte*, 274.
 Gillett *v.* Rippon, 375.
 ——— *v.* Peppercorne, 7.
 Gillibrand *v.* Gould, 291.
 Gilmore, *ex parte*, 275.
 Gingell *v.* Perkins, 255, 256, 326, 327.
 Glaister *v.* Hewer, 437.
 Glascott *v.* Lang, 472, 541.
 Glover, in the goods of, 106.
 ——— *v.* Rogers, 546.
 Goddard *v.* Complin, 325.
 Goodall *v.* Pickford, 557.
 Goode *v.* Burton, 345.
 Goodson *v.* Ellisson, 276.
 Gordon, Lord, *v.* Lord Hertford, 492.
 ——— *v.* Ball, 520.
 ——— *v.* Crawford, 353.
 Gore, *ex parte*, 16.
 ——— Langton, *ex parte*, 337.
 ——— *v.* Stacpoole, 469.
 Goring, *ex parte*, 28.
 Gosbell *v.* Archer, 99, 107, 202.
 Gosling's case, 400, 402.
 ——— *v.* Carter, 30, 292.
 Goss *v.* Lord Nugent, 451, 455.
 Gough *v.* Bult, 190.
 Gould, *ex parte*, 459.
 ——— *v.* Shayer, 397.
 Govett *v.* Richmond, 392.
 Gowland *v.* De Faria, 354, 357, 358.
 Graham *v.* Jackson, 257, 269.
 ——— *v.* Musson, 85.
 ——— *v.* Oliver, 502.
 ——— *v.* Sime, 335.
 Grainge, *ex parte*, 312.
 Grand Junction Canal Company *v.* Dimes,
 429.
 Granger *v.* Worms, 54.
 Grant *v.* Ellis, 188.
 ——— *v.* Maddox, 110.
 ——— *v.* Mills, 347.
 ——— *v.* Munt, 40, 309.
 Gravenor *v.* Miles, 559.
 Gray *v.* Briscoe, 367, 374.
 ——— *v.* Gray, 572.
 Great Northern Railway Company, *ex
 parte*, 336.
 Great Western Railway Co. *v.* Cripps, 492.
 Green *v.* Bailey, 65, 152.
 ——— *v.* Briggs, 539.
 ——— *v.* Pulsford, 164, 526.
 ——— *v.* Smith, 114, 126.
 Greene *v.* Cramer, 104.
 Greenhalgh *v.* Manchester and Birmingham
 Railway Company, 226.
 Greenlaw *v.* King, 15, 16, 23, 414.
 Greenwood *v.* Churchill, 59, 299, 412.
 ——— *v.* Rothwell, 204.
 ——— *v.* Taylor, 283.
 Gregory *v.* Gregory, 25.
 ——— *v.* Mighell, 477, 481.
 Greswold *v.* Marsham, 429.
 Grey *v.* Grey, 437, 438, 439, 440.
 Griffin *v.* Stanhope, 420, 425.
 Grissall *v.* Stelfox, 173.
 Grose *v.* West, 168.
 Grosse *v.* Gayer, 6.
 Grove *v.* Bastard, 158, 165, 469, 526.
 Grover *v.* Hugell, 18, 20, 547.
 Groves *v.* Perkins, 353.
 Grugeon *v.* Gerrard, 34.
 Guest *v.* Homfray, 146, 542.
 Gwynn *v.* Lethbridge, 534, 536.
 Haigh *v.* De la Cour, 454.
 ——— *v.* Jaggard, 519.
 Hall, *ex parte*, 420.
 ——— *v.* Bainbridge, 453.
 ——— *v.* Betty, 100, 137, 446.
 ——— *v.* Franck, 310.
 ——— *v.* Jenkinson, 518.
 ——— *v.* Laver, 221, 470, 521.
 ——— *v.* Noyes, 25.
 ——— *v.* Smith, 40, 53.
 ——— *v.* Warren, 496.
 Hallen *v.* Runder, 95.
 Hallett *v.* Middleton, 370.
 Hamilton *v.* Denny, 434.

- Hamilton *v.* Royle, 428.
 Hamlet, *in re*, 35.
 Hammond *v.* Toulmin, 376.
 Hampshire *v.* Bradley, 276.
 Hanbury *v.* Litchfield, 410, 472, 502.
 Hanley *v.* Cassan, 87, 310.
 Hansard *v.* Hardy, 403.
 Hanson *v.* Keeting, 5, 273.
 ——— *v.* Lake, 335, 336.
 Harbidge *v.* Warwick, 137.
 Harding, *in re*, 341.
 ——— *v.* Ambler, 351.
 ——— *v.* Harding, 572.
 Hardwicke, *ex parte*, the Earl of, 338.
 ———, Earl of, *v.* Lord Sandys, 116, 567.
 ——— *v.* Vernon, 22.
 Harford *v.* Purrier, 116, 207.
 Hargrave *v.* Hargrave, 169, 170.
 Hargreaves *v.* Rothwell, 412.
 Harington *v.* Hoggart, 82.
 Harland *v.* Binks, 424.
 Harnett *v.* Yielding, 490, 492, 498, 503.
 Harper, *in re*, 271.
 ——— *v.* Faulder, 395.
 ——— and Jones, *in re*, 341.
 Harrington *v.* Long, 112.
 Harris *v.* Davison, 237.
 ——— *v.* Wall, 10.
 Harrison, *in re*, 341, 342.
 ——— *v.* Borwell, 197.
 ——— *v.* Coppard, 379, 544.
 ——— *v.* Southcote, 350.
 Harrison *v.* Duignan, 199, 416.
 Hart *v.* Hart, 65, 111, 152, 161.
 Hartley *v.* Wharton, 10.
 Hartly *v.* O'Flaherty, 393.
 Harvey *v.* Grabham, 455.
 ——— *v.* Mount, 7.
 ——— *v.* Phillips, 152.
 Harwood *v.* Tooke, 385.
 Hasell, *ex parte*, 189, 190.
 Haslock *v.* Fergusson, 46.
 Hastings *v.* Wilson, 37, 129.
 Hatch *v.* Hatch, 7.
 Hatherton, Lord, *v.* Bradburne, 121, 327.
 Hawkins, *ex parte*, 123, 124.
 ——— *v.* Gathercole, *see* Addenda.
 ——— *v.* Holmes, 108, 482.
 Haydon *v.* Bell, 218, 535.
 Hayes *v.* Bailey, 538.
 Haynes *v.* Hare, 47.
 Head *v.* Egerton, 392.
 Headen *v.* Rosher, 357.
 Heaphy *v.* Hill, 515.
 Hearn *v.* Tomlin, 222.
 Helsham *v.* Langley, 491.
 Heming *v.* Archer, 565, 568.
 Hemingway *v.* Fernandes, 362, 470, 492.
 Hemming *v.* Mayo, 476.
 Hemming *v.* Spiers, 174, 175.
 Henderson *v.* Barnewell, 81, 82.
 Henson *v.* Coope, 451.
 Hepworth *v.* Heslop, 565.
 Herbert *v.* Tuckal, 180.
 Hercy *v.* Ferrers, 204.
 Herring *v.* Cloberry, 414, 415.
 Hertford, Marquis of, *v.* Boore, 514.
 Hesse *v.* Stevenson, 373, 410.
 Hicks *v.* Hankin, 84.
 Hickson *v.* Collis, 241.
 Hide *v.* Hide, 563.
 Hiern *v.* Mill, 163, 408, 472.
 Higgins *v.* Senior, 444.
 ——— *v.* Shaw, 289.
 Higginson *v.* Clowes, 49, 50, 61, 485, 534.
 Hill *v.* Buckley, 304, 307, 308, 309, 499.
 Hillary *v.* Waller, 159, 162, 176, 524.
 Hincksman *v.* Smith, 354, 357.
 Hinde *v.* Blake, 424.
 ——— *v.* Whitehouse, 102.
 Hindle *v.* Dakins, 564, 566.
 Hinton *v.* Hinton, 462.
 Hippesley *v.* Spencer, 119.
 Hipwell *v.* Knight, 214, 215.
 Hitchcock *v.* Giddings, 382.
 ——— *v.* Sedgwick, 410.
 Hitchens *v.* Lander, 112.
 Hobson *v.* Bell, 58, 77, 78, 162, 166.
 ——— *v.* Middleton, 369.
 Hoby *v.* Roebuck, 95.
 Hodder *v.* Ruffin, 555, 566, 572.
 Hodge, *ex parte*, 338.
 Hodges *v.* Horsfall, 453.
 ——— *v.* Lord Litchfield, 147, 202, 446.
 Hodgkinson *v.* Cooper, 138.
 Hodgson *v.* Dean, 406, 410.
 ——— *v.* Shaw, 567.
 Hoggart *v.* Scott, 495.
 Holden *v.* Chalcraft, 475.
 ——— *v.* Hayn, 40.
 Hole *v.* White, 478, 479.
 Holford *v.* Phipps, 276.
 Holland *v.* Clark, 192.
 Hollick, *ex parte*, 313.
 Hollis *v.* Claridge, 204.
 Holmes *v.* Baddeley, 415.
 ——— *v.* Blogg, 11.
 ——— *v.* Buckley, 378.
 Holroyd *v.* Wyatt, 555, 556, 561.
 Holyman, *ex parte*, 16.
 Homfray *v.* Seroope, 181.
 Honeycomb *v.* Waldron, 401.
 Hood *v.* Beauchamp, 180.
 ——— *v.* Hall, 569.
 ——— *v.* Phillips, 442.
 Hooper *v.* Goodwin, 551, 556.
 Hopkins *v.* Grazebrook, 447.
 ——— *v.* Hopkins, 469.

- Hordern, *ex parte*, 313.
 Hore v. Smith, 338.
 Horlock v. Smith, 201.
 Horn v. Horn, 292.
 Hornby v. Matcham, 205.
 Horne v. Wingfield, 58, 130.
 Horsfall v. Hey, 111, 255.
 Hoskins v. Phillips, 225.
 Hotham v. Somerville, 236.
 Houghton v. Houghton, 433.
 Howard, *in re*, 340.
 ——— v. Braithwaite, 106.
 ——— v. Ducane, 20.
 ——— v. Hopkyns, 46, 496.
 ——— v. Shaw, 222, 449.
 Howarth v. Smith, 165, 523.
 Howel v. George, 491, 492, 498, 499.
 ——— v. Howell, 23, 426, 427.
 ——— v. Richards, 373.
 Howes v. Brnshfield, 369.
 Howland v. Norris, 508.
 Hubert v. Treherne, 107.
 ——— v. Turner, 107.
 Hughes, *ex parte*, 17, 24, 28.
 ——— v. Kearney, 347.
 ——— v. Kelly, 190, 199.
 ——— v. Lipscombe, 554, 556.
 ——— v. Parker, 51.
 ——— v. Wynne, 201.
 Huguenin v. Baseley, 7.
 Hull v. Vaughan, 120, 223.
 Humble v. Humble, 561.
 ——— v. Hunter, 444.
 Humphrey v. Gery, 198, 199.
 ——— v. Lucas, 444.
 Humphreys v. Hollis, 464, 465.
 ——— v. Horne, 484.
 ——— v. Roberts, 556, 558, 559.
 Humphries v. Harrison, 119.
 ——— v. Horne, 383.
 Hungate v. Gascoigne, 175.
 Hunt v. Danvers, 367.
 ——— v. Silk, 444.
 Hunter, *ex parte*, 73.
 ——— v. Daniel, 112, 472.
 ——— v. Nockolds, 199, 539.
 Hunting v. Sheldrake, 376.
 Hurd v. Fletcher, 368.
 Hurley v. Baker, 445.
 Hutchinson, *ex parte*, 36, 272.
 ——— v. Bowler, 452.
 ——— v. Manchester Railway Com-
 pany, 225.
 ——— v. East Lancashire Railway
 Company, 225.
 ——— v. Morly, 454.
 ——— v. Morritt, 524.
 Hutton v. Mansell, 564.
 ——— v. Warren, 452.
 Hyde v. Dallaway, 49, 197, 545.
 Hyde v. Edwards, 460.
 ——— v. Wrench, 105.
 Ibbottson v. Rhodes, 42, 228, 394.
 Icely v. Grew, 448.
 Incorporated Society v. Richards, 190,
 192.
 Ireland v. Bircham, 369.
 Irnham, Lord, v. Child, 483, 488, 496.
 Ithel v. Potter, 108.
 Ivemey, *ex parte*, 319.
 Jack v. Armstrong, 319, 401.
 Jackson v. Grant, 476.
 ——— v. Jackson, 433.
 ——— v. Lever, 117, 511.
 ——— v. Milfield, 569.
 ——— v. Rowe, 392, 405, 407, 408.
 Jacob v. Kirk, 100, 102.
 James, *ex parte*, 21, 22, 23, 24.
 ——— v. Salter, 189.
 ——— v. Shore, 110.
 Jefferson v. Tyrer, 30.
 Jeffereys v. Small, 433.
 Jeffreys v. Smith, 557.
 Jenkins v. Briant, 376.
 ——— v. Hiles, 531.
 ——— v. Hutchinson, 85, 445.
 ——— v. Keymis, or Keymes, 423, 425.
 ——— v. Portman, 129.
 Jenkinson v. Pepys, 485.
 Jennings v. Blencorne, 384.
 ——— v. Bond, 393, 406.
 ——— v. Hopton, 521.
 Jerrard v. Saunders, 392.
 Jerritt v. Weare, 368.
 Jervoise v. Clarke, 553.
 ——— v. Duke of Northumberland, 157.
 Jendwine v. Alcock, 528, 529.
 Jillard v. Edgar, 378, 430.
 Johnson v. Johnson, 282.
 ——— v. Kennett, 284, 285, 286, 287.
 ——— v. Lawson, 177.
 ——— v. Legard, 422, 424, 462, 490.
 ——— v. St. Peters, Hereford, 386.
 Johnston v. Todd, 177.
 Johnstone v. Baber, 30, 551, 571.
 Jolland v. Stainbridge, 402, 403.
 Jones, *ex parte*, 193.
 ——— *in re*, 340, 341, 342.
 ——— v. Barkley, 449.
 ——— v. Downman, 84.
 ——— v. Edney, 53, 56.
 ——— v. Evans, 500.
 ——— v. Flint, 94, 95.
 ——— v. Jones, 229, 334, 393.
 ——— v. Kearney, 6, 384.
 ——— v. Lewis, 246, 338, 339, 340.

- Jones *v.* Littledale, 444.
 ——— *v.* Matthie, 34.
 ——— *v.* Mudd, 294.
 ——— *v.* Nanney, 82.
 ——— *v.* Newman, 452.
 ——— *v.* Powles, 390.
 ——— *v.* Price, 146, 214, 285.
 ——— *v.* Pugh, 414.
 ——— *v.* Roe, 385.
 ——— *v.* Smith, 206, 347, 390, 403, 405,
 407, 408, 409, 410, 411, 412.
 ——— *v.* Stanley, 390.
 ——— *v.* Thomas, 20.
 ——— *v.* Williams, 558.
 Jordan *v.* Jones, 493, 568, 569.
 Joyce *v.* De Moleyns, 392.
 Joynes *v.* Statham, 484.
 Jumpson *v.* Pitchers, 194, 569.

 Keatinge *v.* Keatinge, 568.
 Keeble *v.* Dennish, 476.
 Kenneys *v.* Proctor, 83.
 Kendall *v.* Beckett, 354.
 ——— *v.* Hulls, 413.
 Kennedy *v.* Daly, 426.
 ——— *v.* Green, 206, 207, 267, 409, 413.
 ——— *v.* Lee, 98, 105.
 Kenney *v.* Wexham, 511.
 ——— *v.* Browne, 395, 411, 426.
 Kent *v.* Newman, 430.
 Kenworthy *v.* Schofield, 102, 106.
 Keppell *v.* Bailey, 361.
 Ker *v.* Clobery, 506.
 Kerr *v.* Gillespie, 414.
 Kerrey Glazier, *in re*, 328.
 Ketsey's Case, 11.
 Killick *v.* Flexney, 17.
 Kilpin *v.* Kilpin, 437, 438, 439.
 Kimberley *v.* Jennings, 492.
 King *v.* Cotton, 424.
 ——— *v.* Hamlet, 356, 358.
 ——— *v.* Jones, 374, 375.
 ——— *v.* King, 223, 453, 547.
 ——— *v.* Leach, 569.
 ——— *v.* Moody, 135.
 ——— *v.* Smith, 119.
 ——— *v.* Wilson, 54, 212, 213, 307.
 King of Spain *v.* Machado, 468.
 Kingdon *v.* Nottle, 374.
 Kingsley *v.* Young, 468.
 Kinnard *v.* Christie, 570.
 Kirby *v.* Hansaker, 367.
 Kirk *v.* Clark, 424.
 Kirkman *v.* Booth, 82.
 Kirtland *v.* Pounsett, 120, 222, 448.
 Kirwan *v.* Daniel, 424.
 Knatchbull *v.* Grueber, 218, 221, 497,
 505, 506, 515.
 Knight *v.* Crockford, 449.

 Knight *v.* Harden, 544.
 ——— *v.* Marjoribanks, 18, 353, 359,
 511, 541.
 ——— *v.* Marquis of Waterford, 182.
 Knollys *v.* Alcock, 122, 123.
 ——— *v.* Shepherd, 124.
 Knott, *ex parte*, 391, 392.
 Knowles *v.* Haughton, 490.
 Knox *v.* Kelly, 241.

 Lacey, *ex parte*, 16, 22, 26.
 ——— *v.* Ingle, 282, 346, 404.
 Laird *v.* Pim, 448, 449, 450.
 Lake *v.* Craddock, 433.
 ——— *v.* Gibson, 432, 434.
 Lamb *v.* Newbiggin, 184.
 Lambert *v.* Rogers, 202, 204.
 Lamplugh *v.* Lamplugh, 438, 440.
 Lane *v.* Dighton, 441.
 Lang *v.* Gale, 215.
 Langford *v.* Mahony, 244.
 ——— *v.* Pitt, 521.
 Langham *v.* Great Northern Railway Com-
 pany, 225, 546.
 Langley *v.* Fisher, 541.
 Langton *v.* Horton, 237.
 ——— *v.* Hughes, 454.
 ——— *v.* Tracy, 420.
 Lapham *v.* Pike, 166.
 Lapierre *v.* M'Intosh, 9.
 Lapsley *v.* Grierson, 171, 174.
 Lassence *v.* Tierney, 270, 463, 464, 479.
 Latham, *ex parte*, 511.
 Lavender *v.* Stanton, 285.
 Law *v.* Law, 134.
 ——— *v.* Urlwin, 418, 502, 523.
 Lawes *v.* Bennet, 122.
 Lawrence *v.* Knowles, 120, 121.
 Lawrenson *v.* Bntler, 503.
 Layfield [misprinted Longfield], *ex parte*,
 337.
 Laythoarp *v.* Bryant, 102, 105, 151.
 Leach *v.* Leach, 177.
 ——— *v.* Mullett, 64.
 Leader *v.* Ahearne, 417.
 Lechmere *v.* Brasier, 494, 530, 562.
 Lee, *ex parte*, 36.
 Leech *v.* Leech, 291, 420.
 Leeds, Duke of, *v.* Lord Amherst, 25, 26,
 193.
 Lefroy *v.* Lefroy, 556.
 Legal *v.* Miller, 472, 488.
 Legge *v.* Croker, 379, 380.
 Le Grand *v.* Whitehead, 532.
 Leigh, Lord, *v.* Lord Ashburton, 467.
 Leman *v.* Whitley, 437.
 Lempter, Lord, *v.* Lord Pomfret, 203.
 Lench *v.* Lench, 437.
 Le Neve *v.* Le Neve, 400, 402, 413.

- Leng *v.* Hodges, 175.
 Lesturgeon *v.* Martin, 217, 521.
 Lewin *v.* Guest, 132.
 Lewis, *ex parte*, 37.
 ——— *v.* Campbell, 365, 375.
 ——— *v.* Lane, 436.
 ——— *v.* Marshall, 452.
 ——— *v.* Peake, 375.
 ——— *v.* Thomas, 190, 192.
 ——— *v.* Tucker, 295.
 Liddbetter *v.* Smith, 572.
 Lightfoot *v.* Heron, 462, 485, 489.
 Lindsay *v.* Lynch, 482.
 Lister *v.* Turner, 419.
 Litchfield, Earl of, *in re*, 34.
 Livesey *v.* Harding, 205, 570.
 Llewellyn *v.* Earl of Jersey, 258.
 Lloyd *v.* Collett, 211.
 ——— *v.* Lloyd, 129, 385, 451, 486.
 ——— *v.* Spillet, 441.
 ——— *v.* Tomkies, 367.
 ——— *v.* Wait, 177, 179.
 Lobb *v.* Stanley, 106.
 Lockhart *v.* Hardy, 430.
 Lodge *v.* Lyseley, 233.
 Loft, *in re*, 31.
 London, Mayor of, &c. *v.* Pewterers' Company, 187.
 London and Birmingham Railway Company *v.* Winter, 86, 484, 494, 533.
 London and Brighton Railway Company, *v.* Fairclough, 334.
 London and Southampton Railway Act, *in re*, 336.
 London Bridge Act, *in re*, 260, 261, 337, 339.
 London and Greenwich Railway Company, *in re*, 131, 336.
 ——— *v.* Goodchild, 360.
 Long *v.* Collier, 71, 545.
 ——— *v.* Fletcher, 505.
 Longchamps *v.* Fawcett, 452.
 Lord *v.* Lord, 555.
 ——— *v.* Stephens, 71, 307, 516.
 Loughton, the Rector of, *ex parte*, 337, 339.
 Lovelock *v.* Franklyn, 449.
 Lowe *v.* Swift, 461.
 Lowe's estate, *in re*, 121, 537.
 Lowther *v.* Carlton, 425.
 ——— *v.* Lowther, 510.
 Loyd *v.* Griffith, 259, 536.
 ——— *v.* Read, 437, 438.
 Lucas *v.* Dennison, 192.
 ——— *v.* James, 41, 104, 105, 106, 498, 531.
 Lucy *v.* Levington, 374.
 Ludlow, Corporation of, *v.* Charlton, 83, 108.
 Lufkin *v.* Nunn, 416, 419.
 Lumsden *v.* Fraser, 121.
 Lutwych *v.* Winford, 571.
 Lyddal *v.* Weston, 176, 524, 527.
 Lyford *v.* Coward, 160.
 Loyne *v.* Joyce, 550.
 Lyon *v.* Reed, 159.
 ——— *v.* Colvill, 553.
 Lysney *v.* Selby, 45.
 Lyster *v.* Dolland, 433.
 Maberley *v.* Robins, 82.
 M'Donald *v.* Hanson, 37.
 Macclesfield, Earl of, *v.* Blake, 559.
 Macdonnell *v.* Harding, 298.
 M'Ewan *v.* Smith, 345.
 Mackreth *v.* Simmons, 345, 346, 347, 349, 350.
 Maclean *v.* Dunn, 86.
 M'Namara *v.* Arthur, 455, 456.
 ——— *v.* Williams, 465.
 M'Naughten *v.* Hasker, 546.
 M'Queen *v.* Farquhar, 164, 411, 525, 541.
 Maddison *v.* Andrew, 438, 441.
 Magennis *v.* Fallon, 43, 116, 131, 133, 216, 224, 528.
 Magor *v.* Chadwick, 184.
 Maguire *v.* Armstrong, 417, 418.
 Major *v.* Ward, 34, 166, 167, 169, 252.
 Malcolm *v.* Charlesworth, 318.
 Malden *v.* Merick, or Menil, 352.
 Malden *v.* Fyson, 446, 543.
 Maling *v.* Hill, 540.
 Malins *v.* Freeman, 83, 90, 489, 492.
 Malpas *v.* Ackland, 407.
 Man *v.* Ricketts, 152, 157.
 Mangles *v.* Dixon, 346.
 Mann *v.* Stephens, 361.
 Manners *v.* Furze, 558.
 Manning, *ex parte*, 295.
 Manningford *v.* Toleman, 345, 393, 442.
 Manser *v.* Back, 49, 51, 83, 84, 86, 485.
 Margerison *v.* Saxton, 398.
 Majoribanks *v.* Hovenden, 413.
 Marlborough Estates, *in re*, 312.
 Marlow *v.* Smith, 562.
 Marshall, *ex parte*, 337.
 ——— *v.* Collett, 352.
 ——— *v.* Davies, 476, 520.
 ——— *v.* Lynn, 456.
 ——— *v.* Sladden, 38, 541, 545.
 Martin *v.* Mitchell, 105, 463, 489, 494, 510.
 Martin *v.* Cotter, 41, 51, 510.
 Martinez *v.* Cooper, 317, 393, 395, 396.
 Martyn *v.* Macnamara, 112, 373.
 Mason *v.* Armitage, 83, 90.
 ——— *v.* Corder, 506.

- Mason *v.* Franklin, 467.
 Massey, *in re*, 340, 341, 342.
 Massy *v.* Nanney, 328.
 Masten *v.* Cookson, 172.
 Mather *v.* Priestman, 28, 32.
 Matson *v.* Swift, 299, 568.
 Matthew *v.* Bowler, 349.
 Matthews *v.* Daña, 519.
 Matthie *v.* Edwards, 33, 34.
 Mattock *v.* Kinglake, 450.
 Maundrell *v.* Maundrell, 251.
 Maurice *v.* Wainwright, 567.
 May *v.* Roper, 273.
 Mayfield *v.* Wadsley, 95.
 Maynard's case, 381.
 Meadows *v.* Tanner, 51, 89.
 Mechelen *v.* Wallace, 96.
 Medley *v.* Horton, 248.
 Mellish *v.* Motteux, 40.
 Merchant Tailors' Company, *in re*, 339.
 Metcalfe *v.* Clough, 86.
 ——— *v.* Pulvertoft, 462.
 Meux *v.* Bell, 402.
 ——— *v.* Maltby, 408.
 ——— *v.* Smith, 311.
 Micklethwait *v.* Nightingale, 486.
 Middleton, Lord, *v.* Wilson, 102.
 Middle Claydon Trust, *ex parte*, 338.
 Midland Counties Railway Company, *in re*, 313.
 Midland Counties Railway Company *v.* Oswin, 98, 122, 124.
 Midland Counties Railway Company *v.* Westcomb, 335, 336.
 Middleton, Lord, *v.* Eliot, 205.
 Mildmay *v.* Hungerford, 485.
 Miles *v.* Knight, 175.
 ——— *v.* Langley, 229, 408, 410.
 Milfield, *in re*, 569.
 Millard, *in re*, 271.
 Miller, *ex parte*, 28.
 ——— *v.* Priddon, 290.
 ——— *v.* Smith, 561.
 Milligan *v.* Cooke, 502, 503.
 Mills *v.* Oddy, 62, 63, 88.
 ——— *v.* Osborne, 291.
 Milwold *v.* Earl of Thanet, 514.
 Minchin *v.* Nance, 307.
 ——— *v.* Vance, 145.
 Mines, case of, 527.
 Minor, *ex parte*, 554.
 Mirfin, 274.
 Mitchell *v.* Hayne, 81.
 ——— *v.* Neale, 269.
 Mocatta *v.* Murgatroyd, 430.
 Moggridge *v.* Jones, 450, 451.
 Mole *v.* Smith, 251, 332.
 Molesworth *v.* Opie, 559.
 Mollett *v.* Wackerbarth, 108.
 Molony *v.* Kernan, 16.
 Molton *v.* Camroux, 4, 12.
 Molyneux, *ex parte*, 337.
 Monck *v.* Huskisson, 159.
 Monk *v.* Huskisson, 294, 299.
 Monkton *v.* Attorney-General, 178, 179, 180.
 Montgomery, *ex parte*, 38.
 Moor *v.* Raisbeck, 124.
 Moore *v.* Edwards, 482.
 ——— *v.* Greg, 129.
 Morecock *v.* Dickins, 400.
 Morgan *v.* Hunt, 367.
 Morice *v.* Bishop of Durham, 560.
 Morley *v.* Cook, 58, 72, 131.
 Morphett *v.* Jones, 477, 480.
 Morris *v.* Barrett, 433.
 ——— *v.* Bull, 564.
 ——— *v.* Clarkson, 565.
 ——— *v.* Davies, 169, 170.
 ——— *v.* Ellis, 188.
 ——— *v.* Kearsley, 130, 134.
 Morrison *v.* Arnold, 468.
 Morse *v.* Faulkner, 384.
 ——— *v.* Tucker, 376, 377.
 Morshead *v.* Frederick, 573.
 Mortimer *v.* Capper, 117, 511.
 ——— *v.* Orchard, 472, 543.
 ——— *v.* Shortall, 352.
 Mortlock *v.* Buller, 463, 490, 495, 499, 502.
 Moses *v.* Macfarlane, 444.
 Moss *v.* Gallimore, 386, 387.
 ——— *v.* Matthews, 73, 88.
 Moxhay *v.* Inderwick, 265, 470, 515.
 Mulhallen *v.* Marum, 7.
 Mumma *v.* Mumma, 437, 440.
 Munch *v.* Cockerell, 26.
 Mundy *v.* Jolliffe, 478, 479, 480, 481.
 Murless *v.* Franklin, 437, 439.
 Murley *v.* Sherran, 4.
 Murphy *v.* O'Shea, 16.
 Murray, *in re*, 343.
 ——— *v.* Currie, 86.
 ——— *v.* Palmer, 358, 381.
 Muskerry *v.* Chinnery, 417, 418, 419.
 Muston *v.* Bradshaw, 204, 465.
 Myddleton *v.* Lord Kenyon, 421.
 Mynn *v.* Joliffe, 86.
 Nagle *v.* Baylor, 356, 489.
 Nairn *v.* Prowse, 346.
 Nantes *v.* Corrock, 463.
 Napper *v.* Lord Allington, 371.
 Nash *v.* Aston, 367, 370.
 Naylor *v.* Winch, 21.
 Neale *v.* Mackenzie, 502.
 ——— *v.* Swind, 454.
 Neap *v.* Abbott, 485.

- Neate, *in re*, 340.
 ——— *v.* Duke of Marlborough, 232.
 Neeld *v.* Duke of Beaufort, 84.
 Neesom *v.* Clarkson, 24, 194, 407, 408, 411, 426, 427.
 Neeves *v.* Burrage, 29, 457.
 Neild's Case, 417.
 Nelson *v.* Bridges, 116, 534.
 ——— Earl, *v.* Lord Bridport, 539, 540.
 ——— *v.* Callow, 30.
 ——— *v.* Nelson, 383.
 Nelthorpe *v.* Holgate, 41, 71, 85, 229, 461, 467, 470, 496, 503.
 Nelthorpe *v.* Pennyman, 573.
 Nervin *v.* Munns, 373.
 Netterville Peerage, 157.
 Neville *v.* Wilkinson, 45.
 Newall *v.* Smith, 216, 542.
 Newbold *v.* Roadknight, 122.
 Newenham *v.* Pemberton, 273, 464.
 Newlands *v.* Paynter, 237.
 Newman *v.* Rogers, 209.
 Newry *v.* Enniskillen Railway Company *v.* Coombe, 10.
 Newstead *v.* Searles, 424.
 Newton, *ex parte*, 338.
 Newton *v.* Grand Junction Railway Company, 234.
 Newton's Charity, *in re*, 571.
 Nicholson *v.* Hooper, 394.
 ——— *v.* Knapp, 519.
 Nicloson *v.* Wordsworth, 221, 543, 544.
 Niell *v.* Morley, 4.
 Nind *v.* Marshall, 373.
 Noble *v.* Cass, 366, 377.
 Noel *v.* Bewley, 159, 383, 384.
 ——— *v.* Hoy, 494.
 ——— *v.* Ward, 203.
 ——— *v.* Weston, 269.
 Noke *v.* Awder, 365.
 Nokes *v.* Lord Kilmorey, 210, 542.
 Norfolk, Duke of, *v.* Worthy, 63, 441, 445.
 Norman *v.* Stiby, 377.
 Norris *v.* Le Neve, 413.
 Northwick, *ex parte*, 338.
 Nottingham *v.* Mould, 476.
 Nouaille *v.* Greenwood, 142.
 ——— *v.* Flight, 503, 507.
 Nutbrown *v.* Thornton, 459.
 Ochiltree's, Lord, case, 171.
 O'Connor *v.* Spaight, 96.
 Ogilvie *v.* Foljambe, 50, 101, 217.
 Ohrly *v.* Jenkins, 546.
 Okill *v.* Whittaker, 352.
 Oldfield *v.* Round, 40, 52, 510.
 Oliver *v.* Court, 25.
 Omerod *v.* Harduan, 487.
 Onley *v.* Gardiner, 186.
 Ord *v.* Noel, 33, 36, 490.
 O'Reilly *v.* Thompson, 478.
 Orlebar *v.* Fletcher, 120, 462.
 Orme *v.* Broughton, 447, 455.
 ——— *v.* Wright, 17, 430.
 O'Rourke *v.* Percival, 499.
 Osbaldeston *v.* Askew, 526.
 Osborn *v.* Lea, 228, 395.
 Osborne *v.* Harvey, 67, 220, 516.
 Osgood *v.* Strobe, 422, 423.
 Ouseley *v.* Anstruther, 440, 561.
 Overton *v.* Banister, 3, 394.
 Owen *v.* Davies, 120, 295.
 ——— *v.* De Beauvoir, 189, 200.
 ——— *v.* Foulks, 559.
 ——— *v.* Thomas, 98, 101, 105.
 Owens *v.* Dickenson, 465.
 Oxenham *v.* Esdaile, 267.
 ——— *v.* Lord Falmouth, 299, 544.
 Oxwick *v.* Brockett, 383.
 ——— *v.* Plumer, 389, 411.
 Paddock *v.* Forrester, 185.
 Padwick *v.* Hanslip, 492.
 ——— Platt, 466, 469, 470.
 Paine *v.* Meller, 116, 117.
 Page *v.* Adam, 71, 72, 131, 133, 284, 286, 287, 292.
 ——— *v.* Broom, 262.
 Palmer, *ex parte*, 338.
 ——— *v.* Temple, 73, 213, 451.
 Palmerston, Lord, *ex parte*, 338.
 Parker *v.* Carter, 420, 424.
 ——— *v.* Frith, 209.
 ——— *v.* Gossage, 452.
 ——— *v.* Mitchell, 186.
 ——— *v.* Morrell, 538, 548.
 ——— *v.* Smith, 107, 462, 478, 482.
 Parkes, *ex parte*, 350.
 ——— Charity, *in re*, 571.
 ——— *v.* White, 21.
 Parkins *v.* Moravia, 109.
 Parkinson *v.* Francis, 177.
 Parkhurst *v.* Lowten, 414.
 Parnther *v.* Gaitskell, 310.
 Parrott *v.* Sweetland, 348, 349.
 Partington, *ex parte*, 36.
 Partridge *v.* Scott, 186.
 Pasmore, *ex parte*, 337.
 Paterson *v.* Long, 53, 466.
 Paton *v.* Brebner, 387, 503.
 ——— *v.* Rogers, 299, 499, 531.
 Pawle *v.* Gunn, 93.
 Payne *v.* Cave, 57.
 ——— *v.* Compton, 392.
 Peachey's Case, 436.
 Peacock *v.* Burt, 391, 393.
 ——— *v.* Evans, 357.

- Peacock *v.* Penson, 55, 466, 490, 491, 503.
 Pearce *v.* Pearce, 561.
 Pearsall, *in re*, 272.
 Pearce *v.* Pearce, 164, 165, 415.
 Pearson *v.* Morgan, 42, 45, 395.
 Peate *v.* Dicken, 109.
 Peck *v.* Cardwell, 434.
 Pedder, *ex parte*, 18.
 Peers *v.* Lambert, 506.
 Peirce *v.* Derry, 234.
 Peles *v.* Gervies, 373.
 Pember *v.* Matthews, 483.
 Pender, *in re*, 340.
 Pendrell *v.* Pendrell, 170.
 Penn *v.* Glover, 367.
 Penniall *v.* Harborne, 75.
 Penny *v.* Pretor, 568.
 ——— *v.* Watts, 229, 392, 408, 409, 412.
 Penruddock *v.* Hammond, 415.
 Pepper *v.* Barnard, 138.
 Peppercorn *v.* Peacock, 525.
 Perkes, *ex parte*, 16.
 Perkins *v.* Bradley, 412.
 Perry *v.* Meddowcroft, 388.
 Perry *v.* Smith, 59, 299, 414.
 Persse *v.* Persse, 357.
 Pet and Cally's Case, 370.
 Peto *v.* Gardner, 571.
 Petre *v.* Duncombe, 466.
 Pheysey *v.* Vicary, 186.
 Phillimore *v.* Barry, 106.
 Phillippo *v.* Munnings, 197.
 Phillips *v.* Fielding, 450.
 ——— *v.* Duke of Bucks, 85, 496.
 Pickersgill, *in re*, 272.
 Pierce *v.* Scott, 290.
 Piers *v.* Piers, 171.
 Pimm *v.* Insall, 292.
 Pinckle *v.* Curteis, 214.
 Pitchers *v.* Edney, 81.
 Playford *v.* Playford, 354, 356, 512.
 Plumb *v.* Fuitt, 404, 411.
 Polhill *v.* Walter, 46.
 Poole, *ex parte*, 442.
 ——— *v.* Coates, 127.
 ——— *v.* Hill, 60, 450.
 ——— *v.* Rudd, 88.
 ——— *v.* Shergold, 116, 508, 510.
 Pope *v.* Garland, 41, 52, 53.
 ——— *v.* Roots, 117, 511.
 Popham *v.* Eyre, 210.
 Porcher *v.* Gardner, 450.
 Pordage *v.* Cole, 450.
 Portman *v.* Mill, 56, 295, 303, 304, 308, 506, 508, 528.
 Portmore *v.* Taylor, 355.
 Pott *v.* Todhunter, 424.
 Potter *v.* Sanders, 101, 105, 462, 469.
 Potts *v.* Curtis, 357.
 ——— *v.* Dutton, 340.
 Powell *v.* Divett, 108.
 ——— *v.* Doubble, 56, 64.
 ——— *v.* Edmunds, 50.
 ——— *v.* Martyr, 293.
 ——— *v.* Thomas, 395, 480.
 Powys *v.* Mansfield, 438.
 Poynder *v.* Great Northern Railway Company, 225.
 Prankerd *v.* Prankerd, 439.
 Prendergast *v.* Eyre, 505.
 Preston *v.* Barker, 556.
 Prettyman's Case, 417.
 Price *v.* Assheton, 480, 481.
 ——— *v.* Berrington, 649.
 ——— *v.* Blakemore, 441.
 ——— *v.* Corporation of Penzance, 545.
 ——— *v.* Dyer, 488, 514.
 ——— *v.* Hathaway, 321.
 ——— *v.* North, 304, 573.
 ——— *v.* Price, 550, 557.
 Prior *v.* Horniblow, 197.
 Prodgers *v.* Langham, 424.
 Propert *v.* Parker, 106.
 Prosser *v.* Edmunds, 112.
 ——— *v.* Watts, 142.
 Pullan *v.* Rawlins, 157.
 Pulvertoft *v.* Pulvertoft, 421, 423.
 Purcell *v.* Blennerhasset, 188.
 Purvis *v.* Rayer, 137.
 Pyke *v.* Northwood, 518.
 ——— *v.* Williams, 477.
 Pym *v.* Blackburn, 477, 482, 483.
 ——— *v.* Lockyer, 438.
 Queen, the, *v.* Birmingham and Oxford Junction Railway Company, 29, 98.
 ——— *v.* Bishop's Stoke (Lord of Manor of), 245, 258.
 ——— *v.* Ellis, 242.
 ——— *v.* Steward of Eton Coll. 331.
 ——— *v.* Ingleton (Lord of Manor of), 322.
 ——— *v.* Inhabitants of Mansfield, 169.
 ——— *v.* London and South-Western Railway Co., 99.
 ——— *v.* Middlesex Registrars, 319.
 ——— *v.* Pitt, 253.
 ——— *v.* Rigge, 245.
 Rabbett *v.* Raikes, 61.
 Rackham *v.* Siddall, 38.
 Radcliffe *v.* Eccles, 568.
 Raffety *v.* King, 196.
 Rainy *v.* Vernon, 82.
 Ralph, *ex parte*, 266, 361.

- Ramsbottom *v.* Gosden, 484.
 Ramsden *v.* Manchester Railway Com-
 pany, 224.
 Rand *v.* Macmahon, 157.
 Randall *v.* Morgan, 420.
 Ranken *v.* Harwood, 232.
 Rankin *v.* East and West India Dock
 Company, 225.
 Ravenscroft *v.* Frisby, 198.
 Rawlins *v.* Burgis, 127.
 Rawson *v.* Tasburgh, 133.
 Rayner *v.* Grote, 444.
 Read *v.* Brookman, 159.
 — *v.* Shaw, 35.
 Redding *v.* Wilkes, 471.
 Redington *v.* Redington, 440.
 Redshaw *v.* Newbold, 568.
 Reece *v.* Trye, 201, 415.
 Rees *v.* Lloyd, 161.
 Reeves *v.* Barraud, 81.
 — *v.* Gill, 246, 339.
 Reid *v.* Langlois, 414.
 — *v.* Shergold, 35, 394.
 Reilly *v.* Fitzgerald, 179.
 Rendlesham, Lord, *v.* Meux, 31, 33, 289.
 Rex *v.* Eastbourne, 8.
 — *v.* Holland, 8.
 — *v.* Pedly, 430.
 — *v.* Rigge, 245.
 Reynell *v.* Sprye, 415.
 Reynolds *ex parte*, 22.
 — *v.* Blake, 563.
 — *v.* Nelson, 211, 455.
 — *v.* Waring, 477, 481.
 Rhodes, *in re*, 341.
 Rice, *in re*, 343.
 — *v.* Gordon, 354.
 Rich *v.* Basterfield, 431.
 — *v.* Rich, 373.
 Richards *v.* Att-Gen. of Jamaica, 123.
 Richardson *v.* Chasen, 446.
 — *v.* Horton, 292.
 — *v.* Ward, 535, 567.
 Ricketts *v.* Bell, 461.
 Riddell *v.* Riddell, 365, 366.
 Rider *v.* Jones, 204.
 Ridgway *v.* Gray, 65, 418, 502, 503.
 Rigby *v.* M'Namara, 559.
 — *v.* Macnamara, 561.
 Rigden *v.* Vallier, 432.
 Right *v.* Beard, 120, 449.
 — *v.* Bucknell, 385, 419.
 Riley, App., Crossley, Resp., 113.
 Ripplingall *v.* Lloyd, 202, 213.
 Rist *v.* Hobson, 471.
 Ritchie *v.* Smith, 454, 490.
 Ravis *v.* Watson, 386, 430.
 Roach *v.* Wadham, 361, 365.
 Roake *v.* Kidd, 523.
 Roberts, *in re*, 4.
 — *v.* Marchant, 461, 468.
 — *v.* Massey, 88.
 — *v.* Rowlands, 456.
 — *v.* Tunstall, 25.
 — *v.* Walker, 13.
 — *v.* Williams, 424, 572.
 — *v.* Wyatt, 71, 72, 130.
 Robertson *v.* Great Western Railway Com-
 pany, 466.
 — *v.* Lockie, 34.
 — *v.* Skelton, 560, 572.
 Robinson *v.* Drybrough, 109.
 — *v.* Harman, 447.
 — *v.* Hedger, 238.
 — *v.* Milner, 529.
 — *v.* Musgrove, 63, 64, 69.
 — *v.* Page, 514, 534.
 — *v.* Ridley, 23.
 — *v.* Rosher, 543.
 — *v.* Wall, 51, 89.
 — *v.* Wood, 569.
 Robson *v.* Collins, 483.
 Rochard *v.* Fulton, 402, 406, 412.
 Roche *v.* Cooke, 188.
 Roddy *v.* Williams, 378, 408.
 Rodney *v.* Rodney, 550.
 Rodwell *v.* Phillips, 94.
 Roe *v.* Ireland, 160.
 — *v.* Mitton, 423.
 Roffey *v.* Shallcross, 505.
 Rogers *v.* Brenton, 53.
 Rolleston *v.* Morton, 236.
 Rome *v.* Young, 535.
 Roots *v.* Lord Dormer, 109.
 Roper *v.* Coombes, 457.
 Roscommon Earldom, 171.
 Rose *v.* Cunynghame, 98, 126.
 Rosewell *v.* Prior, 430.
 Rossiter *v.* Walsh, 16.
 Routledge *v.* Grant, 105.
 Rowe *v.* Teed, 482.
 Rowley *v.* Adams, 408.
 Royle *v.* Wynne, 460.
 Rudd *v.* Sewell, 20, 25.
 Rushbrook *v.* Hood, 331, 332.
 Rust *v.* Baker, 172.
 Rutter *v.* Marriott, 564, 572.
 Ryan *v.* Anderson, 469.
 Ryle *v.* Swindells, 512.
 Sainsbury *v.* Jones, 459.
 St. Cross *v.* Lord Howard de Walden,
 452.
 St. George, Parish of, *v.* St. Margaret's,
 169, 170.
 St. John *v.* Bishop of Winton, 127.
 —, Lord, *v.* Boughton, 192.
 St. Katherine's Dock Company, *in re*, 339.

- Sainter *v.* Ferguson, 516.
 Salisbury, *in re*, the Bishop of, 337.
 ——— *v.* Hatcher, 490, 495.
 Salkeld *v.* Johnston, 182, 183, 547.
 Salman *v.* Bradshaw, 366.
 Salmon *v.* Randall, 98.
 Salters' Company *v.* Jay, 184.
 Sanders *v.* Richards, 467.
 Sanderson *v.* Cockermonth Railway Com-
 ——— company, 481.
 ——— *v.* Walker, 21.
 Sansom *v.* Rhodes, 208, 457.
 Satterthwaite *v.* Powell, 174.
 Saunders *v.* Dehew, 390, 391.
 ——— *v.* Gray, 572.
 ——— *v.* Musgrove, 222.
 Saunderson *v.* Jackson, 102, 106, 107.
 Saward *v.* Anstey, 373.
 Sawyer *v.* Birchmore, 414.
 ——— *v.* Mills, 545.
 Savage *v.* Carroll, 481.
 ——— *v.* Foster, 6, 228, 394.
 Savile *v.* Savile, 573.
 Saye and Sele Barony, 170, 171.
 Sayer *v.* Wagstaff, 341.
 Scargill *v.* Hurry, 476.
 Scawin *v.* Scawin, 440.
 Schiff, *in re*, 272.
 Schneider *v.* Heath, 40, 45.
 ——— *v.* Norris, 106.
 Scholefield, *ex parte*, 271.
 ——— *v.* Heafield, 568.
 Schreiber *v.* Creed, 55, 362.
 Scoones *v.* Morrell, 74, 544.
 Scott *v.* Davis, 19.
 ——— *v.* Dunbar, 355, 541.
 ——— *v.* Fenhoulllet, 128.
 ——— *v.* Hanson, 43.
 ——— *v.* Langstaffe, 496.
 ——— *v.* Nesbit, 556.
 ——— *v.* Nixon, 199, 200.
 Scrafton *v.* Quincey, 319.
 Scroope *v.* Scroope, 438.
 Seabourne *v.* Powel, 383.
 Seagood *v.* Meale, 100, 101.
 Seaman *v.* Price, 93.
 ——— *v.* Vawdrey, 52, 503, 506, 527.
 Searle *v.* Colt, 189, 199.
 Seaton *v.* Mapp, 48, 210.
 Seaward *v.* Willock, 449, 457.
 Selby *v.* Selby, 106.
 ——— *v.* Jackson, 4.
 Sellick *v.* Trevor, 68.
 Selsey *v.* Lord Rhoades, 19, 25.
 Sentance *v.* Porter, 546.
 Seton *v.* Slade, 115, 146, 210, 213.
 Sewell *v.* Walker, 355, 357.
 Shadforth *v.* Temple, 122.
 Shackleton *v.* Sutcliffe, 64, 307, 506.
 Shalcross *v.* Dixon, 406.
 Shallcross *v.* Hibherson, 556.
 Shannon *v.* Bradstreet, 461, 489.
 Sharp *v.* Taylor, 490.
 Shaw. *ex parte*, 272.
 ——— *v.* Borrer, 292.
 ——— *v.* Fisher, 459.
 ——— *v.* Shaw, 203.
 ——— *v.* Simpson, 553.
 ——— *v.* Wright, 562.
 Sheffield *v.* Lord Mulgrave, 524.
 Sheffield Canal Company *v.* Sheffield
 ——— and Rotherham Railway Company,
 105.
 Sheldon *v.* Cox, 402, 404, 412, 413.
 Sheehy *v.* Muskerry, 418.
 Shelly *v.* Nash, 76, 357.
 Shelton *v.* Livius, 50.
 Shepherd *v.* Hall, 328.
 ——— *v.* Keatley, 67, 68.
 Sheppard *v.* Doolan, 562.
 ——— *v.* Duke, 197.
 ——— *v.* Wilson, 291.
 Sherry *v.* Oke, 446.
 Sherwood *v.* Beveridge, 562.
 ——— *v.* Robins, 65.
 Shields *v.* Boucher, 179.
 ——— *v.* Rice, 160.
 Shippey *v.* Derrison, 108.
 Shirley, *ex parte*, 274.
 ——— *v.* Stratton, 40.
 Shore *v.* Collett, 202, 315.
 ——— *v.* Wilson, 452.
 Short *v.* Calloway, 375.
 ——— *v.* Stone, 449.
 Shrewsbury *v.* Blount, 46.
 Sibbering *v.* Earl of Balcarres, 355, 356,
 359.
 Sibthorp *v.* Brunel, 450.
 Sidebotham, *ex parte*, 220, 459.
 ——— *v.* Barrington, 133, 217, 530,
 541.
 Sidmouth *v.* Sidmouth, 437, 438, 439,
 440.
 Sidney *v.* Ranger, 18, 550.
 Sillick *v.* Booth, 172, 173, 174.
 Silvester *v.* Bradley, 33.
 Simmonds *v.* Palles, 420.
 Simmons *v.* Pettit, 325.
 Simpson *v.* Lancaster and Carlisle Rail-
 ——— way Company, 99, 118.
 ——— *v.* Gutteridge, 275.
 ——— *v.* Henderson, 452.
 ——— *v.* Margitson, 215, 452.
 Sivell *v.* Abraham, 545, 546.
 Skarf *v.* Soulby, 426.
 Skeats *v.* Skeats, 438.
 Skeels *v.* Shearley, 233.
 Skelton *v.* Robertson, 117, 300, 561.

- Skinner *v.* M'Douall, 104, 471, 483.
 Sladden, *in re*, 341.
 Slane Peerage Case, 178, 179.
 Slaney *v.* Wade, 178, 179, 180.
 Slater's Devises, *ex parte*, 337.
 Small *v.* Attwood, 40, 44, 220, 221, 378, 468, 538, 548.
 Smart *v.* Sanders, 86.
 Smith, *ex parte*, 18, 338.
 —, *in re*, 275, 340.
 — *v.* Baker, 384.
 — *v.* Bowin, 489.
 — *v.* Burnam, 146.
 — *v.* Capron, 41, 207, 218, 530.
 — *v.* Chichester, 314.
 — *v.* Clarke, 89.
 — *v.* Compton, 373, 375.
 — *v.* Dimes, 342.
 — *v.* East India Company, 84.
 — *v.* Ellis, 48, 68.
 — *v.* Garland, 462, 490.
 — *v.* Henley, 111, 161, 453.
 — *v.* Hurst, 232, 236.
 — *v.* Jackson, 81, 518.
 — *v.* Keating, 420.
 — *v.* Leigh, 544, 547.
 — *v.* Lloyd, 506, 517.
 — *v.* Nelson, 563.
 — *v.* Phillips, 430.
 — *v.* Sleep, 445.
 — *v.* Surman, 94.
 — *v.* Tolcher, 509.
 — *v.* Tombs, 93.
 — *v.* Wilson, 452.
 Sneezum *v.* Marshall, 110.
 Sober *v.* Kemp, 429.
 Soloman *v.* Turner, 454.
 Sotilichos *v.* Kemp, 452.
 South Wales Railway Company, *ex parte*, 225.
 Southby *v.* Hutt, 58, 67, 146, 152, 217.
 Southwell *v.* Nicholas, 491.
 Souter *v.* Drake, 137.
 Southcomb *v.* Bishop of Exeter, 88, 212, 222, 515, 539.
 Sowarsby *v.* Lacy, 285.
 Sparke *v.* Montrion, 204.
 Spackman *v.* Timbrell, 292.
 Spain, King of, *v.* Machado, 468.
 Spartali *v.* Benecke, 452.
 Spence *v.* Hogg, 469.
 Spencer's Case, 361, 363.
 — *v.* Marriott, 368.
 Spiller *v.* Westlake, 450, 451.
 — *v.* Spiller, 518, 519.
 Spratt *v.* Jeffery, 67.
 Spurrier *v.* Fitzgerald, 471, 482.
 — *v.* Mayoss, 60.
 Squire *v.* Campbell, 55.
 Squire *v.* Tod, 444, 456.
 Stacey *v.* Elph, 19.
 Stacpoole *v.* Stacpoole, 422.
 Stafford Barony, Case of, 171.
 Staines *v.* Morris, 261, 265, 267, 541, 547.
 Stamford, Earl of, *v.* Dunbar, 182, 183.
 Stamps *v.* Birmingham and Stour Valley Railway Company, 99, 118.
 Standen *v.* Christmas, 386, 387.
 Stanhope *v.* Earl Verney, 390.
 Stanley *v.* Hayes, 368, 369.
 Stannard *v.* Forbes, 373.
 — *v.* Ullithorne, 258.
 Stanwix's Case, 174.
 Stapylton *v.* Scott, 492, 531.
 Staynroyde *v.* Locock, 370.
 Stead *v.* Cragh, 464.
 — *v.* Dawber, 455, 456.
 — *v.* Nelson, 463, 464.
 Steed *v.* Calley, 12.
 Steedman *v.* Poole, 5, 409.
 Steel *v.* Prickett, 168.
 Steele *v.* Stewart, 414.
 Stephen, *in re*, 341.
 Stephens *v.* Guppy, 133.
 Stevens, *ex parte*, 225, 336.
 — *v.* Guppy, 165, 219, 264, 472, 532.
 — *v.* Stevens, 395, 396.
 Steward *v.* Bridges, 624.
 Stewart *v.* Alliston, 56, 63, 504.
 — *v.* Smith, 211, 213, 515.
 Stikeman *v.* Dawson, 3, 394.
 Stileman *v.* Ashdown, 438.
 Stilwell, or Stillwell, *v.* Mellersh, 568.
 — *v.* Wilkins, 353, 510.
 Stirke, *in re*, 341.
 Stokes *v.* Moore, 106, 108.
 — *v.* Russell, 362.
 Stone, 274.
 — *v.* Commercial Railway Company, 98.
 Story *v.* Lord Windsor, 390.
 Stourton, Lord, *v.* Meers, 495.
 Stowell *v.* Robinson, 213.
 Stratford *v.* Bosworth, 543.
 — *v.* Twynam, 19.
 Street, *in re*, 272.
 — *v.* Brown, 454.
 Stronghill *v.* Buck, 253.
 Stuart, *ex parte*, 263.
 Stubbs, *in re*, 270, 272.
 — *v.* Sargon, 570.
 Stuckey *v.* Drewe, 398.
 Sturge *v.* Starr, 352.
 — *v.* Sturge, 353, 357.
 Sturgis *v.* Champneys, 464.
 Suir Island Charity, *in re*, 571.

- Sussex Peerage Case, 177.
 Sutherland *v.* Briggs, 478.
 Swansborough *v.* Coventry, 55, 56.
 Sweet *v.* Lee, 103, 106.
 ——— *v.* Southcote, 425.
 Swift *v.* Davis, 439.
 Syers *v.* Jonas, 452.
 Sykes *v.* Giles, 87.
 Symes, *in re*, 442.
 Symons *v.* James, 48, 51, 73.

 Talbot *v.* Ford, 492.
 Tanner *v.* Florence, 407.
 ——— *v.* Smith, 72, 446, 456.
 Tarback *v.* Marbury, 425.
 Tardiffe *v.* Scrughan, 349.
 Tasker *v.* Small, 30, 115, 388, 466, 467.
 Tawney *v.* Lynn and Ely Railway Com-
 pany, 98.
 Taylor, *ex parte*, 275.
 ——— *in re*, 337.
 ——— *v.* Ashton, 46.
 ——— *v.* Baker, 403, 409.
 ——— *v.* Blacklow, 149.
 ——— *v.* Brown, 212, 544.
 ——— *v.* Debar, 371, 383.
 ——— *v.* Forster, 414.
 ——— *v.* Martindale, 51, 530.
 ——— *v.* Salmon, 84, 467.
 ——— *v.* Stibbert, 408, 415, 416.
 ——— *v.* Tabrum, 29, 35, 37.
 ——— *v.* Wheeler, 462.
 Tebbott *v.* Voules, 123.
 Teed *v.* Carruthers, 347.
 Templer *v.* Sweet, 555, 556, 557.
 Tendring *v.* London, 494.
 Tetley, *ex parte*, 338.
 Tew *v.* Jones, 387.
 Thames Haven Company *v.* Brymer, 449,
 450.
 Thelsson *v.* Woodford, 126.
 Thicknesse *v.* Lancaster Railway Company,
 29.
 Thomas *v.* Blackman, 98, 104, 478.
 ——— *v.* Dering, 71, 464, 499, 502.
 ——— *v.* Gwynne, 538, 569.
 ——— *v.* Phillips, 20, 543, 545.
 ——— *v.* Powell, 381.
 Thompson, *in re*, 341.
 ——— *v.* Blackstone, 491.
 ——— *v.* Leach, 4.
 ——— *v.* Simpson, 394, 404.
 Thomson *v.* Miles, 211, 457.
 ——— *v.* Thomson, 490.
 Thornbury *v.* Beville, 105, 107.
 Thornett *v.* Haines, 51, 89.
 Thornhill *v.* Glover, 571.
 ——— *v.* Thornhill, 556.
 Thorneley, app. Aspland, resp. 113.

 Thoroton, *ex parte*, 337.
 Thynne, Lady *v.* Earl of Glengall, 478.
 Thorpe *v.* Freer, 542.
 Tickle *v.* Brown, 186.
 Tilsley, *ex parte*, 557.
 Tipping *v.* Power, 565.
 Titley *v.* Davies, 392, 429.
 Tindal *v.* Cobham, 517.
 Todd *v.* Gee, 459, 499, 541.
 ——— *v.* Hoggart, 456.
 Toft *v.* Stephenson, 114, 190, 198, 346.
 Tomkins, *ex parte*, 37.
 Tomlins *v.* Tomlins, 177.
 Tomlinson *v.* Manchester and Birmingham
 Railway Company, 490, 517.
 Toulmin *v.* Steere, 412, 430.
 Tourville *v.* Nash, 390, 393.
 Towgood, *ex parte*, 337.
 Townley *v.* Bedwell, 122.
 Townsend *v.* Champenowne, 131, 133,
 470, 542, 544, 547.
 Townshend, Marquis of, *v.* Stangroom,
 304, 483, 484, 488, 492, 542, 543.
 Tracy Peerage, 178.
 Trafford, *ex parte*, 338.
 Trail *v.* Kibblewhite, 177.
 Travis *v.* Collins, 454.
 Trefusis *v.* Lord Clinton, 295, 566.
 ——— *v.* Clinton, 559.
 Trevelyan *v.* Charter, 23, 377, 535.
 Trimlestown, Lord, *v.* Kemmis, 161.
 Trinity House, Corporation of, *ex parte*,
 337.
 Trower *v.* Newcombe, 44.
 Trulock *v.* Robey, 192.
 Tryon, *in re*, 201, 341.
 Tulk *v.* Moxhay, 361.
 Tull *v.* Owen, 197.
 Tunstall *v.* Trappes, 232, 233, 400, 402.
 Turner, *in re*, 274.
 ——— *v.* Doe dem. Bennett, 191.
 ——— *v.* Harvey, 46, 510.
 ——— *v.* Richardson, 37.
 ——— *v.* Trelawny, 16, 19, 23.
 ——— *v.* Wright, 519.
 Turquand *v.* Vanderplank, 396.
 Twentyman *v.* Barnes, 485.
 Twigg *v.* Fifield, 567.
 Twining *v.* Morrice, 90, 492, 504.
 Twyford *v.* Trail, 530.
 Twynam *v.* Pickard, 366, 386.
 Twyne's Case, 425, 426.
 Tylden *v.* Hyde, 285.
 Tylee *v.* Webb, 413.
 Tyler *v.* Beversham, 304, 352.
 Tyndale *v.* Warre, 556.
 Tyrconnel, Earl of, *v.* Duke of Ancaster,
 56.
 Tyrer *v.* King, 447.

Underhill, *ex parte*, 276.

Vale *v.* Davenport, 561.

Van *v.* Corpe, 54, 483.

Vancouver *v.* Bliss, 504, 539, 546.

Vandaleur *v.* Blagrove, 310.

Vane *v.* Lord Barnard, 282.

Vansittart *v.* Collier, 560.

— *v.* James, 560.

Vaughan *v.* Hancock, 96.

Vernon *v.* Keys, 46.

— *v.* Thellusson, 560.

Vesey *v.* Elwood, 555.

Vickers *v.* Scott, 31.

Vigers *v.* Pike, 354, 380, 510, 512.

Vincent *v.* Going, 198, 555.

Wace *v.* Bickerton, 374.

Waddington *v.* Bristow, 94.

Wakefield *v.* Newbon, 204.

Wakeman *v.* Duchess of Rutland, 469, 537.

Waldron *v.* Forester, 295.

Walker, *in re*, 295.

— *v.* Aston, 568.

— *v.* Barnes, 70, 503.

— *v.* Earl Beauchamp, 179.

— *v.* Eastern Counties Railway Company, 98, 460.

— *v.* Jeffreys, 210, 515.

— *v.* Moore, 447.

— *v.* Richardson, 321.

— *v.* Smalwood, 29.

Wall *v.* Bright, 124.

— *v.* Stubbs, 510.

Wallis *v.* Harrison, 430.

Walond *v.* Walond, 556, 557, 559.

Walsh *v.* Trevanion, 414.

Walsingham, Lord, *v.* Goodricke, 415.

Walter *v.* Maunde, 41.

Walters, *in re*, 342.

— *v.* Jackson, 569.

— *v.* Pyman, 530, 540.

Waltham, Lord, Case of, 523.

Walton *v.* Holt, 524.

— *v.* Earl of Stamford, 417.

Walwyn *v.* Coutts, 420.

Warburton *v.* Farn, 35.

— *v.* Loveland, 401, 402.

— *v.* Sandys, 29, 290.

— *v.* Vaughan, 538, 569.

Ward, *ex parte*, 311.

— *v.* Arch, 190.

— *v.* Cooke, 556, 558.

— *v.* Moore, 127.

— *v.* Trathen, 149, 562.

Wardle *v.* Carter, 355, 357.

Waring *v.* Hoggart, 54.

Warn *v.* Bickford, 370.

Warren *v.* Richardson, 218, 531.

Waterford, Marquis of, *v.* Knight, 182.

Waters *v.* Groom, 18, 19.

Watkins *v.* Cheek, 288.

Watling *v.* Horwood, 110.

Watt *v.* Evans, 478.

Watts, *ex parte*, 18.

— *v.* Cresswell, 394.

— *v.* Martin, 558.

— *v.* Symes, 248, 430.

Watson *v.* Brickwood, 560.

— *v.* England, 172, 174.

— *v.* Reid, 515.

— *v.* Toone, 17.

Way, *ex parte*, 272.

Webb *v.* Russell, 364.

Webber, *ex parte*, 271.

— *v.* Jones, 568.

Webster *v.* Birchmore, 173.

Wedderburn *v.* Wedderburn, 26.

Wedgwood *v.* Adams, 492, 539, 545.

Welchman, *in re*, 341.

Welcome *v.* Upton, 161, 167, 185.

Wells, Dean and Chapter of, *v.* Dodding-
ton, 188.

— *in re*, 340, 342.

West *v.* Reid, 158, 165, 406, 407, 411,
412.

— *v.* Vincent, 559.

Westby *v.* Westby, 357.

Western *v.* Perrin, 542.

— *v.* Russell, 103, 106, 499, 500,
510.

Wethered *v.* Wethered, 385.

Whaley *v.* Bagnet, 99, 478.

Whatman *v.* Gibson, 361.

Wheatley *v.* Slade, 499, 500.

Wheeler *v.* Collier, 89, 100.

Whichcote *v.* Bramston, 355.

— *v.* Laurence, 25.

Whitbread *v.* Jordan, 151, 206, 317, 409.

Whitechurch *v.* Whitechurch, 128.

Whitcomb *v.* Foley, 530.

— *v.* Minchin, 18.

Whitcombe, *ex parte*, 341.

White *v.* Bartlett, 81.

— *v.* Cuddon, 49, 53, 65, 78, 463,
490, 502, 545.

— *v.* Damon, 510, 511.

— *v.* Foljambe, 261, 542.

— *v.* Hill, 168.

— *v.* Lisle, 167.

— *v.* Proctor, 106.

— *v.* Wakefield, 350, 411.

— *v.* Wilson, 560.

Whitmel *v.* Farrel, 197.

Whitworth *v.* Gaugain, 237, 325, 399.

Whittaker *v.* Whittaker, 530.

Whittle *v.* Henning, 464.

- Wickham *v.* Evered, 517.
 ——— *v.* Hawker, 185.
 Wigg *v.* Wigg, 115, 390.
 Wiggins *v.* Lord, 81.
 Wilcock *v.* Purchase, 173.
 Wild *v.* Lockhart, 565.
 Wilde *v.* Gibson, 45, 354, 379, 380, 413, 472.
 Wildgoose *v.* Wayland, 402, 403.
 Wilding *v.* Andrews, 564.
 ——— *v.* Richards, 420.
 Wilker *v.* Bodington, 392.
 Wilkins *v.* Fry, 35.
 Wilkinson, *ex parte*, 341.
 ——— *v.* Lloyd, 444.
 ——— *v.* Proud, 185.
 ——— *v.* Torkington, 534.
 Willan *v.* Willan, 492.
 Willatts *v.* Busby, 462.
 Willcox *v.* Bellaers, 529, 542.
 Willes *v.* Levett, 128.
 Willey *v.* South-Eastern Railway Company, 225.
 Williams, *ex parte*, 274.
 ——— *v.* Attenborough, 551, 557, 559.
 ——— *v.* Bland, 158.
 ——— *v.* Carter, 495.
 ——— *v.* Edwards, 71, 88, 501, 541, 547.
 ——— *v.* Earl of Jersey, 395.
 ——— *v.* Lambe, 392.
 ——— *v.* Owen, 388.
 ——— *v.* Protheroe, 112.
 ——— *v.* Shaw, 472.
 ——— *v.* Teale, 535.
 ——— *v.* Wace, 563.
 ——— *v.* Wentworth, 4.
 Williamson *v.* Seaber, 24.
 Willis *v.* Brown, 320.
 ——— *v.* Hiscox, 276.
 ——— *v.* Willis, 437.
 Willoughby *v.* Backhouse, 455.
 ——— *v.* Willoughby, 390, 391.
 Wills *v.* Stradling, 477, 478, 479.
 Willson *v.* Leonard, 266.
 Wilmot *v.* Pike, 229, 393.
 Wilson *v.* Allen, 160, 544.
 ——— *v.* Clapham, 294, 306, 542.
 ——— *v.* Fuller, 40, 380, 454.
 ——— *v.* Greenwood, 550.
 ——— *v.* Kearse, 11.
 ——— *v.* Knubley, 376.
 ——— *v.* Rastall, 414.
 ——— *v.* Short, 113.
 ——— *v.* Tummon, 86, 87.
 ——— *v.* Wilson, 420.
 Wiltshire *v.* Rabbits, 229, 393.
 Winch *v.* Winchester, 308, 486, 542.
 Winged *v.* Lefebury, 120.
 Winter *v.* Lord Anson, 310, 345, 347, 348, 350, 370.
 ——— *v.* Blades, 297.
 ——— *v.* Vizitelly, 545.
 Winterbottom *v.* Ingham, 119, 120, 222, 448, 522, 523.
 Wise *v.* Wise, 412.
 Withy *v.* Cottle, 209, 460, 520.
 Witty, *ex parte*, 271.
 Wollaston *v.* Hakewill, 153.
 Wolseley *v.* Cox, 332.
 Wood *v.* Abrey, 353, 355, 359.
 ——— *v.* Birch, 433, 434, 436.
 ——— *v.* Court, 130.
 ——— *v.* Dixie, 426.
 ——— *v.* Downes, 26.
 ——— *v.* Griffith, 501.
 ——— *v.* Harman, 291.
 ——— *v.* Lake, 92.
 ——— *v.* Lambirth, 272.
 ——— *v.* Marquis of Londonderry, 417, 419.
 ——— *v.* Machu, 212, 520.
 ——— *v.* Patteson, 2.
 ——— *v.* Waud, 184.
 ——— *v.* White 30 (misprinted Wood), 465, 467, 533.
 Woodall, *in re*, 274.
 Woodcock, *in re*, 274.
 Woodhouse *v.* Jenkins, 369.
 ——— *v.* Meredith, 15.
 Woodman *v.* Higgins, 205.
 Woodroff *v.* Greenwood, 368.
 Woodroffe *v.* Allen, 355.
 ——— *v.* Titterton, 523.
 Woods *v.* Woods, 390.
 Woodward *v.* Miller, 50, 57, 89, 546.
 Woollam *v.* Hearn, 483, 484, 486.
 Wootton *v.* Steffanoni, 9.
 Worley *v.* Frampton, 38, 78, 261.
 Worrall *v.* Jacob, 420.
 Worthington, *in re*, 271.
 ——— *v.* Morgan, 206, 317, 345, 408, 409, 411, 412.
 ——— *v.* Warrington, 446, 447.
 Wray *v.* Steele, 435.
 Wren *v.* Kirton, 557, 566.
 Wright *v.* Burroughes, 386, 387.
 ——— *v.* Colls, 444.
 ——— *v.* Dannah, 83, 84.
 ——— *v.* Howard, 209, 504, 545.
 ——— *v.* Maunder, 32, 35.
 ——— *v.* Smythies, 162.
 ——— *v.* Snowe, 395, 629, 643.
 ——— *v.* Wilson, 62.
 Wrightson *v.* Hudson, 325, 400.
 Wrixon *v.* Vise, 198.
 Wyatt *v.* Barwell, 402.
 Wyllie *v.* Ellice, 427.

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| Wynn <i>v.</i> Morgan, 495. | Yorke, <i>ex parte</i> , 18. |
| Wynne <i>v.</i> Griffith, 132, 418. | Young <i>v.</i> Guy, 87, 310. |
| —— <i>v.</i> Price, 459. | —— <i>v.</i> Raincock, 253, 373. |
| —— <i>v.</i> Styan, 197. | —— <i>v.</i> Lord Waterpark, 191, 198. |
| —— <i>v.</i> Tyrwhitt, 150. | —— <i>v.</i> White, 87, 310. |
| Wyvill <i>v.</i> Bishop of Exeter, 117, 544. | Younge <i>v.</i> Duncombe, 517. |
| Yates <i>v.</i> Farebrother, 81. | Younghusband <i>v.</i> Gisborne, 238. |
| Yeates, <i>in re</i> , 338. | Zouch <i>v.</i> Parsons, 2, 5. |
| York Buildings Company <i>v.</i> Mackenzie,
15, 23. | |

ADDENDA ET ERRATA.

- P. 3, n. (j), add, as a reference, "*Wright v. Snowe*, 2 De G. & S. 321."
- P. 4, n. (g), add, "see also *Price v. Berrington*, 7 Ha. 394."
- P. 23, n. (a), for "*Bower v. Evans*," read "*Bowen v. Evans*."
- P. 30, n. (p), for "*Wood v. Wood*," read "*Wood v. White*."
- P. 32, n. (a), for "L. C." read "V. C. K. B."
- P. 57, n. (y), for "*Case*," read "*Cave*."
- P. 87, n. (b), for "8," read "9 Ves."
- P. 95, n. (a), for "*Haller v. Runder*," read "*Hallen v. Runder*."
- P. 102, n. (o), for "2 B. & Ad.," read "2 B. & Cr."
- P. 102, n. (t), for "2 Bro. & P.," read "2 Bos. & P."
- P. 108, n. (d), insert, as second reference, "*Davidson v. Cooper*, 13 Mee. & W. 343."
- P. 109, in sixth line from bottom, for "10th," read "11th Oct."
- P. 115, n. (c), for "3," read "1 Atk."
- P. 115, n. (d), insert, as first reference, "6 Ves. 352."
- P. 129, in first marginal note, for "assignment," read "purchase."
- P. 183, n. (e), for "*Fellows*," read "*Fellowes*."
- P. 186, n. (w), for "2," read "1 Cro. M. & R."
- P. 226, add, as an additional paragraph, "It has been recently held that the 68th section of the Lands Clauses Consolidation Act applies to the case of land of which the company is in possession under the 85th section; *Adams v. Blackwall Railway Company*, 2 Mac. & G. 118."
- P. 235, 12th line from top, add, as a reference to the word "tithes," "It has just been decided by V. C. Rolfe that a registered judgment against a spiritual incumbent operates, under this section, as a charge on the tithes and other profits of the living; *Hawkins v. Gathercole*, 14 Jur. 1103."
- P. 241, n. (n), insert, at end of note, "But the exception does not seem to extend to terms for years in copyholds; Prid. on J. 3rd ed. 155."
- P. 266, n. (o), supply reference, "p. 314."
- P. 269, the first three lines should be qualified as follows: "The vendor must, if practicable, in person convey, or, as respects copyholds, surrender the property; the purchaser need not unnecessarily rely upon a power of attorney."
- P. 274, n. (i), for "*In re*," read "*Ex parte Williams*."
- P. 283, between first and second paragraphs, insert, "The 2 & 3 Vict. c. 11, s. 10, in effect authorizes the Commissioners of the Treasury, upon payment of such sums into the Exchequer as they may require, or on such other terms as they may think proper, to issue a certificate discharging, as in favour of an actual or intended purchaser or mortgagee and his representatives, the lands, tenements, or hereditaments of a vendor, who is a Crown debtor or accountant, from all subsisting and future liability to the Crown, except, in the case of leases, in respect of the rents and covenants, &c.; and, under the 9th section, a *quietus*, when obtained by a Crown debtor or accountant, is to be registered at the Common Pleas at Westminster."
- P. 299, n. (e), "*Elliott v. Turner*, 477," insert "13 Sim."
- P. 313, n. (x) Add, as a reference, "*Barry v. Marriott*," 2 De G. & S. 491.
- P. 319, n. (d), for "Hud. & Bro." read "1 Hud. & Bro."
- P. 326, n. (k), the statement here referred to seems to have been corrected by Mr. Tilsley in a second edition.
- P. 328, after 17th line from top, insert, in continuation of the paragraph, "and the result, it is conceived, must be the same, although the person holding the original agreement be not made a party to the lease."
- P. 332, in first marginal note, insert "not" after "But."
- P. 337, n. (w), for "*Ex parte Longfield*," read "*Ex parte Layfield*."
- P. 337, n. (a), add, "the transfer of purchase-money from the account of the Railway Act to that of an administration suit, has been held to be a 'payment out of Court,' within the 80th sect., *Dinning v. Henderson*, 2 De G. & S. 485."
- P. 413, in sixth line from bottom, insert "be" before "notice."
- P. 415, n. (g), "*Beadon v. King*" is now reported, 17 Sim. 34.
- P. 441, n. (l), add, as a reference, "*Trench v. Harrison*, 17 Sim. 111."
- Pp. 465 and 471, *Gaston v. Frankum* is now reported, 2 De G. & S. 561.
- P. 541, second marginal note, for "unsuccessful," read "successful."

A COMPENDIUM,

&c. &c.

CHAPTER I.

Chapter I.

AS TO RESTRICTIONS ON THE GENERAL CAPACITY TO BUY OR SELL REAL ESTATE.

1. *As to who are generally incompetent to sell.*
2. *Who are relatively incompetent to sell.*
3. *Who are generally incompetent to purchase.*
4. *Who are relatively incompetent to purchase.*

THE questions who may sell, and who may buy, real estate, may be conveniently discussed, by assuming the existence of a general capacity to enter into the relation of vendor or purchaser; and by then treating of the exceptions to the general rule.

Incapacities to sell or buy, may be considered as of two descriptions; 1st, such as depend on some circumstance personal to the proposed vendor or purchaser, and affecting his general capacity to buy or sell any real estate: and, 2ndly, such as depend on the relation in which he stands to the particular property proposed to be sold or bought; or to the party with whom he purposes to deal.

Incapacities
to sell or buy
are

general
or relative.

(1.) *As to incapacities to sell of the 1st description.*

A proposed vendor, although having a good title to, and being the absolute owner of property, and standing in no

As to who
are generally
incompetent
to sell.

Chapter I.

Infants.

situation of trust towards the proposed purchaser, may yet be under some personal incapacity, which may prevent a sale: that is to say, he may be, 1st, An infant: if so, he can, as a general rule, execute no conveyance which will bind, either himself when he comes of age, or his heirs in the event of his dying, either under age, or of full age, but without having (in those cases which admit thereof) confirmed the transaction (a).

Estates of, cannot be sold by the Court, except under special circumstances.

But they may convey under Statute.

And are empowered by Statute to sell for certain special purposes.

May exercise collateral power.

And may sell under custom of gavelkind.

Nor has a Court of Equity any authority to sell the real estate of an infant, under the mere notion that a sale will be beneficial (b). *See House of Lords v. The Bishop of Exeter, 10 Cl. & F. 100.*

But, by Statute, in particular cases, infants holding land in trust, or subject to the debts of their ancestor or testator, are enabled to convey, under the authority of the Court of Chancery (c); and, in various special cases, infants, or their guardians, are enabled, by Statute, to sell and convey land for purposes connected with religion (d), instruction (e), or works of a public nature.

So, an infant can convey under a power simply collateral (f), but he cannot be empowered, at least as against himself, to contract for the sale of land, or to do any other act which requires an exercise of discretion.

But, by the custom of gavelkind, an heir at the age of 15, may, for valuable consideration, sell, and convey for an estate in possession, lands which he took by descent; the

(a) 4 Bac. Abr. 360, *et seq.*; any deed which takes effect by delivery, is, if executed by an infant, voidable only; but Letters of Attorney, and deeds which delegate a mere power, and convey no interest, are absolutely void; *Zouch v. Parsons*, 3 Burr. 1794; *Anon. v. Handcock*, 17 Ves. 383; *Allen v. Allen*, 2 Dru. & War. 307.

(b) *Calvert v. Godfrey*, 6 Beav. 97; and see *Wood v. Patten*, 10

Beav. 541; as to a sale under special circumstances, see *Garmstone v. Gaunt*, 1 Coll. 577.

(c) *Vide infra*, Ch. XIII. and XIX.

(d) See, for a list of the Church Building Acts, the preamble to 3 & 4 Vict. c. 60.

(e) See 4 & 5 Vict. c. 38; and 6 & 7 Will. IV. c. 90.

(f) 1 Sug. Pow. 211, 7th edit.

conveyance being by feoffment, and livery of seisin being delivered by him in person (*g*). Chapter I.

An infant, however, has no privilege to commit a fraud (*h*): if, therefore, he were to sell and convey, asserting that he had attained his majority, it is conceived that the purchaser would, in Equity, be entitled to the protection of the legal estate, (supposing him to have acquired it;) and that, if the infant, (supposing *him* to have the legal estate,) were to proceed at Law to recover the property, Equity would restrain the action, except upon the terms of his refunding the purchase-money; for instance, where an infant received a premium for a lease of his lands, upon his false assertion that the lessor was his guardian, Lord *King* decreed a return of the premium with interest (*i*). It has, however, been held that, in order that Equity may interfere, there must be something equivalent to misrepresentation on the infant's part; and that the mere fact of his entering into a transaction which *could* be valid only if entered into by an adult, is not such a fraud as entitles the other party to relief (*j*).

Fraudulent sale by, what relief against, in equity.

There must be misrepresentation.

By the 53 Geo. III. c. 141, s. 8, all contracts for the sale of any annuity or rent-charge by an infant are declared utterly void, notwithstanding any attempted confirmation after majority: and the intended purchaser is made guilty of a misdemeanor.

Sale of annuity or rent-charge by, is void by Statute.

Or, 2ndly, The proposed vendor may be a lunatic or idiot: in which case, according to the early authorities, his conveyance may be set aside by his Committee, or his heirs after his death: yet he himself, though he recovered his senses, was said to be unable to avoid it (*k*); at least if

Lunatics.

Sales by, how far void or voidable.

(*g*) 4 Bac. Abr. pp. 49, 50. This customary feoffment is excepted from the 8 & 9 Vict. c. 106, s. 3.

(*h*) Chambers on Infancy, 412; and see *Overton v. Banister*, 3 Hare, 503.

(*i*) *Esron v. Nicholas*, 1 De G. & S. 118.

(*j*) *Stikeman v. Dawson*, 1 De G. & S. 90.

(*k*) *Beverley's case*, 4 Rep. 123 b.

Chapter I.

made by feoffment, with livery of seisin delivered by him in person (*l*) : it has, however, been held, that a Bargain and Sale, Lease and Release, or other innocent conveyance by a lunatic, is absolutely void (*m*) ; and the 8 & 9 Vict. c. 106, s. 4, which deprives a Feoffment of its tortious operation, would appear to render such a conveyance by a lunatic equally inoperative ; the rule, however, against a party being allowed to stultify himself, would not prevail in Equity (*n*), nor, according to the modern authorities, at Law (*o*), in favour of a purchaser who had knowingly dealt with an incompetent vendor. While, on the other hand, it has been held, at Law, in a very recent case, that where a person, apparently of sound mind and not known to be otherwise, enters into a contract which is fair and *bonâ fide*, and which is executed and completed, and the property, the subject-matter of the contract, cannot be restored so as to put the parties *in statu quo*, such contract cannot afterwards be set aside, either by the alleged lunatic or his representatives (*p*) : and such seems to be the present doctrine of the Courts of Equity (*q*).

Fine or recovery.

Or disentailing assurance by.

And if a lunatic levied a Fine or suffered a Recovery in person, the conveyance was held to be good (*r*) : but, of course, no similar result would now be attained by his executing an assurance under the Fines and Recoveries Abolition Act.

Statutory

And, in various special cases, Committees of Lunatics

(*l*) *Thompson v. Leach*, Comb. 468 ; *Beverley's case*, *ubi supra*.

(*m*) 2 Sug. Pow. 179, 7th edit.

(*n*) Shelf. on Lunacy, 350.

(*o*) *Mollon v. Camroux*, 2 Exch. Rep. 487, 501 ; *S. C.*, in error, 18 L. J., N. S. Exch. Cham. 356, and cases cited.

(*p*) *S. C.*

(*q*) *Niell v. Morley*, 9 Ves. 478 ;

Williams v. Wentworth, 5 Beav. 325 ; *Selby v. Jackson*, 6 Beav. 192 ; Aff. on Appeal, p. 204.

(*r*) See Shelf. on Lunacy, p. 316, *et seq.* ; *Murley v. Sherren*, 8 Ad. & E. 754 ; but as to the deed making the tenant to the præcipe, and the declaration of uses (if any) being affected by the Lunacy, see 3 Atk. 313.

are, as are infants (*s*), enabled by Statute, to sell and convey land.

Or, 3rdly, The proposed vendor may be a married woman; in which case she may, with her husband, convey her freehold estates under the Fines and Recoveries Abolition Act; but any other conveyance executed by her is, at Common Law, absolutely void (*t*): her copyhold estates will pass by her surrender with her husband's concurrence; or, if her interest be merely equitable, either by such a surrender or by deed acknowledged under the Act; and her legal terms for years will pass by the sole assignment of her husband (*u*); though whether they will be bound by his contract, in the event of his death in her lifetime and before conveyance, seems to be doubtful (*v*): as respects her equitable terms for years, it would appear, that in order to perfect the title, she must join in and acknowledge the assignment (*w*).

And although the legal and equitable fee simple may be vested in a married woman, she and her husband may, nevertheless, be unable effectually to assure it to a purchaser; for where the property has been acquired under a will or settlement which forbids alienation during coverture, such restriction is binding, although no trustee be interposed (*x*).

But a married woman may, in exercise of a power, pass, either a legal estate, by limitation of an use, or an equitable estate: and she has always an implied power to dispose of, as if she were single, her equitable interest in property settled to her separate use with no restriction upon alienation (*y*).

Chapter I.

power of
Committees.

Married
woman can
in general
only convey
under 3 & 4
Will. IV. c.
74.

May be re-
stricted from
selling,
although the
entire estate
be given to
her.

May convey
in exercise
of a power.

May dispose
of her sepa-
rate estate,
if not re-
strained
from antici-
pation.

(*s*) *Supra*, p. 2.

(*w*) See *Hanson v. Keating*, 4

(*t*) Burton's Comp. pl. 206; see judgment in *Zouch v. Parsons*, 3 Burr. 1805.

Hare, 1.

(*x*) *Baggett v. Meux*, 1 Ph. 627; *Steedman v. Poole*, 6 Hare, 193.

(*u*) Burton's Comp. pl. 895.

(*y*) 1 Sug. Pow. 206, 7th edit.;

(*v*) *Infra*, Ch. XVIII.

Vendors, 230; and see also, *infra*,

Chapter I.

Relief
against frau-
dulent sale
by.

Traitors,
felons, &c.

Bankrupts
and insol-
vents.

Power given
to incapaci-
tated own-
ers by Lands
Clauses Con-
solidation
Act, 1845.

The observations already made (*z*) upon fraudulent sales by an infant, apply, it is conceived, to similar transactions by a married woman (*a*).

Or, lastly ; The proposed vendor may have been guilty of treason, or murder, either as principal or accessory before the fact (*b*) ; and have thereby subjected his land to forfeiture, and escheat, upon his attainder (*c*), that is upon sentence of death being passed upon him (*d*) ; or of any other felony punishable with death, attainder upon which involves forfeiture during life (*e*) : or he may have incurred a Præmunire (*f*) ; and in any of these cases, or at least in any of the first three, his conveyance, although *bond fide*, for valuable consideration, and to a purchaser without notice, is subject to the inchoate rights of the Crown, or the Lord of the fee (*g*). In these cases, however, that which we have, for convenience, referred to as an incapacity to sell, is, in strictness, a mere want of title as against the Crown or Lord of the fee : Leaseholds of traitors and felons are forfeited to the Crown upon conviction (*h*) ; but, of these, a *bond fide* sale between the crime and the conviction, will, it seems, be good (*i*). So, the incapacities of bankrupts and insolvents to sell, depend merely upon their want of title as against their assignees.

And, with reference to incapacities to sell both of the 1st and of the 2nd descriptions, we may here refer to the general consolidating Act of the 8 Vict. c. 18 ; which enables incapacitated owners, or owners of partial estates,

Ch. XVIII. as to contracts for sale
by married women.

(*z*) *Supra*, p. 3.

(*a*) See *Jones v. Kearney*, 1 Dru.
& War. 134 ; *Savage v. Foster*, 9
Mod. 35 ; and 6 Ves. 181.

(*b*) 54 Geo. III. c. 145 ; 9 Geo.
IV. c. 31, s. 2.

(*c*) 3 Bac. Abr. 738.

(*d*) 4 Jarm. Conv. by S. 74.

(*e*) 4 Bl. Com. 385, and 54 Geo.
III. c. 145.

(*f*) 16 Ric. II. c. 5.

(*g*) See *Grosse v. Gayer*, Cro. Car.
172 ; 6 Bac. Abr. 383 ; 4 Jarm. Conv.
by S. 75.

(*h*) 4 Bl. Com. 388.

(*i*) *Ibid.*

to sell land to the promoters of undertakings authorized by Acts in which the general Act is incorporated (*j*). Chapter I.

(2.) *As to incapacities of the 2nd description affecting vendors.*

As to who are relatively incompetent to sell.

Persons having no transferable title.

Persons standing in a special relation towards the proposed purchaser, which secures undue personal influence.

These may be considered to consist of, 1st, the want of a transferable (*k*) title to the property proposed to be dealt with; and, 2ndly, the existence of some relation on the part of the proposed vendor to the purchaser which prevents a sale except under special precautions; for instance, an agent for purchase cannot sell his own estate to his principal, without acquainting him with the facts (*l*); and, as a general rule, whenever such a relation subsists between the contracting parties as may enable one to exercise an undue influence over the other, whether it be that of guardian and ward, solicitor and client, trustee and *cestui que trust*, medical man and patient, spiritual adviser and penitent, or the like, the Court, upon proof of the exercise of such undue influence, will set aside the transaction, and will consider the circumstance of the real facts not being stated on the face of the assurances to be in itself *prima facie* evidence of fraud (*m*).

(*j*) See sects. 6, 7, *et seq.*

(*k*) See *Att.-Gen. v. Corporation of Plymouth*, 9 Beav. 67; where a corporation was held incapable in Equity of contracting to sell property, by reason of a duty which it owed in respect thereof to the public. As to the alienation of Charity lands by Trustees, see *Att.-Gen. v. Corporation of Newark*, 1 Hare, 395; *Att.-Gen. v. Brettingham*, 3 Beav. 91; *Att.-Gen. v. South Sea Company*, 4 Beav. 453; and cases cited: such alienations are not necessarily void, but it lies on the parties claiming under them to show

that they were beneficial for the Charity: *vide infra*, Ch. XIX. See 4 & 5 Vict. c. 35, s. 92, removing a customary restriction which, in some manors, prevented the alienation of ancient copyhold tenements in portions.

(*l*) *Gillett v. Peppercorne*, 3 Beav. 78.

(*m*) See *Mulhellen v. Marum*, 3 Dru. & War. 317; *Ahearne v. Hogan*, 1 Dru. 310; *Gibson v. Russell*, 2 Y. & C. C. C. 104; *Hetch v. Hatch*, 9 Ves. 292; *Huguenin v. Baseley*, 14 Ves. 273; *Dent v. Bennett*, 4 Myl. & Cr. 269; *Harvey v. Mount*, 8 Beav.

Chapter I.

As to who are generally incompetent to purchase and hold land.

Corporations cannot hold without a licence.

Purchase by an unincorporated class of persons bad.

Parochial corporations may purchase.

An alien cannot hold in person or by a trustee.

Leases to, were formerly void.

(3.) *As to incapacities of the 1st description affecting purchasers.*

Purchasers must, necessarily, be either individuals or a corporation: corporations, of whatever description, may purchase, but cannot, in their corporate capacities, hold lands, except under a licence to hold in mortmain (*n*) or the special provisions of an Act of Parliament.

Purchases by individuals (who are unincorporated) must be made by them in their private capacities and individual names: *e.g.* a purchase by, *eo nomine*, the inhabitants of a place, or the parishioners or churchwardens of a parish, is bad; so is a similar purchase by, or grant to, the commoners of a waste (*o*).

But, by custom, in London and some other places, the parson and churchwardens are a corporation to purchase land (*p*); and so, by Statute, are churchwardens and overseers generally in some matters relating to the Poor Laws (*q*), and to Education (*r*).

An alien, before denization, can purchase; but, upon office found, the land belongs to the Crown (*s*); and the Crown can claim land vested in trustees for an alien (*t*); but not any part of the produce of sale of real estate, devised in trust to sell and to divide the purchase-money among aliens (*u*).

The claim of the Crown extends to terms for years (*v*); and, until recently, the only exception was of leases of

439; and cases therein respectively cited.

(*n*) Co. Litt. 2 *b*.

(*o*) Co. Litt. 3 *a*.

(*p*) Note 4 to Co. Litt. 3 *a*.

(*q*) 9 Geo. I. c. 7, s. 4; Sug. 883.

(*r*) Jointly with the minister; see

4 & 5 Vict. c. 38, s. 8.

(*s*) Co. Litt. 2 *b*; *Rex v. Holland*,

Aleyn, 14.

(*t*) 1 Beav. 90

(*u*) *Du Hourmelin v. Sheldon*, 4 Myl. & Cr. 525: and see p. 530, as to distinction between that case and *Fourdrin v. Gowdey*, 3 Myl. & K. 383.

(*v*) Co. Litt. 2 *b*; *Rex v. Eastbourne*, 4 East, 107.

Chapter I.

habitations of alien merchant friends during their lives and residence within the realm (*w*) ; but leases, or agreements for a lease (*x*), to alien artificers or handicraftsmen, were, prior to the 7 & 8 Vict. c. 66, absolutely void ; although an assignment to an alien artificer of a subsisting lease has been held valid (*y*) : by the above Act, however, a resident alien friend may hold any lands, houses, or other tenements, for the purpose of residence, or of occupation by himself or his servants, or for the purpose of any business, trade, or manufacture, for any term not exceeding twenty-one years, as if he were a natural-born subject (*z*).

Exception under 7 & 8 Vict. c. 66, of 21 years' leases of premises for residence or trade.

By the Acts of 7 Anne, c. 5, 4 Geo. II. c. 21, and 13 Geo. III. c. 21, the children of a male British-born subject, or of his son, are, with certain special exceptions (*a*), to be considered natural-born subjects ; and, by 7 & 8 Vict. c. 66, the child born of a British mother out of the Queen's allegiance, is rendered capable of holding land (*b*).

Who entitled as a natural-born subject to hold land.

After denization, the alien can both purchase and beneficially hold land ; and is entitled to land purchased before denization, if the Crown, before office found, has, by the letters patent of denization, confirmed his estate (*c*).

Denization, effect of.

Naturalization, for the purpose of holding land, could formerly be obtained only by a special Act of Parliament (*d*) ; but, under the provisions of the 7 & 8 Vict. c. 66 (*e*), any resident alien may petition the Secretary of State for the home department for a certificate of naturalization ; upon obtaining which, and taking the oath of allegiance required by the Act, the alien, (so far as the posses-

Naturalization under 7 & 8 Vict. c. 66.

(*w*) 32 Hen. VIII. ch. 16, s. 13.

Fitch v. Weber, 6 Hare, 51.

(*x*) *Lapierre v. McIntosh*, 1 Per.

(*b*) Sect. 3 of Act.

& Dav. 629 ; 9 Ad. & E. 857.

(*c*) *Fourdrin v. Gowdey*, 3 Myl.

(*y*) *Wootton v. Steffenoni* 12 Mees.

& K. 383.

& W. 129.

(*d*) As to naturalization in the

(*z*) Sect. 5 of Act.

Colonies, see 10 & 11 Vict. c. 83.

(*a*) As to which, see the Acts, and

(*e*) See sect. 6, *et seq.*

Chapter I.

Marriage of female alien to a natural-born subject.

sion and enjoyment of property are concerned, and subject to any special exceptions contained in the certificate), acquires all the rights and capacities of a natural-born subject: a female alien, upon marriage to a natural-born or naturalized subject, becomes herself naturalized (*f*); but this provision does not apply where the woman died before the passing of the Act (*g*).

Infant purchasing may elect when he comes of age.

An infant can purchase; but, on his attaining twenty-one, he may, at his option, adopt or abandon the contract (*h*); and should he, either having attained twenty-one die without agreeing to it, or die under that age, the like privilege descends on his representatives.

What amounts to confirmation.

Any written instrument signed by the infant after attaining majority amounts to a ratification, if of such a nature as, if signed by an adult, would amount to an adoption of the act of a party professing to act as his agent (*i*): and where a written ratification is proved, it lies on the infant to show, if he can, that, at the time of giving it, he had not attained majority (*j*).

He may be bound by simple acquiescence.

And it is not essential that there should be any express ratification; mere acquiescence may suffice: for instance, occupation, or receipt of the profits by the infant, without dissent, for a short time after attaining his majority, would, it is conceived, be a confirmation of the transaction by election (*k*): but in order to sustain an action for the purchase-money, there must be a ratification in writing (*l*).

What time allowed for election.

No precise rule can be laid down as to the time within which the infant, after attaining majority, must make his

(*f*) Sect. 16.

(*g*) *Count De Wall's case*, 12 Jurist, 145.

(*h*) *Kelsey's case*, Cro. Jac. 320; Co. Litt. 2 *b*.

(*i*) *Harris v. Wall*, 1 Exch. Rep. 122.

(*j*) *Hartley v. Wharton*, 3 Per.

& Dav. 529.

(*k*) See Sug. 884; 8 Taunt. 42; *Cork and Bandon Railway Company v. Cazenove*, 11 Jur. 802; and *Newry and Enniskillen Railway Company v. Coombe*, 3 Exch. 716.

(*l*) 9 Geo. IV. c. 14, s. 5.

election ; it appears, however, that an unexplained acquiescence of three or four months (*m*), or, probably, a shorter period (*n*), in the case of a purchase, would amount to acquiescence ; a fortnight would, it appears, be a reasonable time in which to elect (*o*).

And, although the infant may abandon the contract, and thus relieve himself from all unsatisfied liabilities under it, he cannot, it is said, recover money which he has actually paid, unless such payment were procured by fraud (*p*) ; and his inability to restore the consideration, would be an additional bar to the action ; for instance, where an infant paid a premium for a lease of business premises, and entered upon and occupied them, it was held, upon his attaining majority and repudiating the lease, that, whatever might be the general rule, he could not, under the circumstances, recover the premium, inasmuch as he had enjoyed a part of that term for which it formed the consideration (*q*) ; and although, upon the purchase of the fee simple, the same decisive effect might not always be attributable to mere occupation (*r*), it is conceived, that any act affecting the value of the estate, *e. g.*, the felling of ornamental timber, or the removal or alteration of buildings, &c., would be conclusive against his right to reclaim the purchase-money.

Whether he
can recover
considera-
tion money.

If, however, the infant had fraudulently represented himself to the vendor as an adult, it is conceived that Equity would relieve the vendor by restraining any action for a return of the purchase-money, (supposing such an action to be maintainable,) and would allow the vendor to avail himself of any collateral securities which he might hold for the payment of the unpaid part of the purchase-

Fraudulent
purchase by,
relieved
against, in
equity.

(*m*) *Ketsey's case*, Cro. Jac. 320. Chambers on Infancy, 431.

(*n*) See judgment in *Hobnes v. Blogg*, 8 Taunt. 42 ; Park, J. 508.

(*o*) 2 Durn. & E. 439.

(*q*) *Holmes v. Blogg*, 8 Taunt. 508.

(*p*) Macph. on Infants, 484 ; *Wilson v. Kearse*, 2 Pea. Ca. 196 ; see

(*r*) See however *Blackburn v. Smith*, 2 Exch. R. 783.

Chapter I.

money; but it could not enforce any security given by the purchaser personally during his infancy; such being absolutely void (*s*).

Purchase by lunatic, how far voidable.

A lunatic or idiot may purchase; and according to the early authorities, cannot himself, though he recover his senses, avoid the transaction: but it may be set aside by his Committee after inquisition; or by his representatives after his decease, in any case except that of his having recovered his senses and agreed to the purchase (*t*); the present doctrine of the Courts seems, however, to be in accordance with what has been already stated with respect to contracts for sale by lunatics (*u*); in a modern case, a purchase of an estate in consideration of the release of a bond debt, was set aside at the suit of a legatee of the bond debt (*v*).

Purchase by married woman voidable.

A married woman may purchase; and, if she have separate property, she can, and perhaps even though she do not refer to it, bind it by a contract for purchase (*w*): in other cases the purchase may be annulled by the husband; and the purchase-money may be recovered by him, in trover, unless she purchased by his authority (*x*); or it may be annulled by herself after his death, although he may have agreed to it; or by her representatives, unless she agreed to it after her husband's decease (*y*).

May be confirmed by acquiescence.

The general rules above referred to, respecting acquiescence by an infant after majority, will, it is conceived, apply to the case of a married woman holding over after the termination of the coverture; and, in the case of a purchase by a married woman representing herself to be

(*s*) Chambers on Infancy, 444.

(*t*) 2 Bl. Com. 292; Shelf. on Lunacy, 347.

(*u*) *Supra*, p. 4; see *Molton v. Camroux*, 2 Exch. R. 487; *S. C.* (in error) 18 L. J., N. S. Exch. 356.

(*v*) *Steed v. Calley*, 1 Keen, 620;

and see *S. C.*, as to evidence of insanity.

(*w*) Sug. 885; *vide infra*, Ch. XVIII.

(*x*) *Garbrand v. Allen*, 1 Ld. Raymond, 224.

(*y*) Sug. 885; Co. Litt. 3 a.

single, or who, contracting as if single, has so dealt with the property as to prevent its perfect restoration *in specie*, Equity would, it is conceived, secure to the vendor all his legal rights, and would restrain the exercise of any adverse legal right either by the married woman or her husband, (supposing him to have been privy to the fraud).

Chapter I.
Fraudulent
purchase by,
relieved
against.

Roman Catholics were formerly subject to disabilities in this respect, which have been removed by a modern statute (z).

Roman
Catholics.

Persons guilty of the crime of treason, or felony, or who have incurred a *Præmunire*, may, before judgment, purchase land; but, upon judgment, it will be subject to the rights of the Lord of the fee, or of the Crown: purchases by such persons after judgment are subject to the same rules as purchases by aliens before denization (a); the capacity of a felon sentenced to transportation, is not restored until the term of transportation has expired (b).

Traitors,
felons, &c.

So, upon a purchase by a bankrupt before obtaining his certificate (c); or by an insolvent under the 1 & 2 Vict. c. 110 (d), before his final discharge; or by an insolvent under the 5 & 6 Vict. c. 116 (e), before his debts are paid in full, the land vests in the assignees; and, according to the Law as it existed before the passing of the recent Bankruptcy Law Consolidation Act, where the bankrupt's estate had not paid 15s. in the pound, and he had previously been bankrupt or discharged under an Insolvent Act, or had compounded with his creditors, the rights of

Bankrupts
and insol-
vents.

(z) 10 Geo. IV. c. 7. As to the position of Roman Catholics with reference to land devoted to religious or charitable purposes, see 2 & 3 Will. IV. c. 115, and Anstey on Roman Catholics, p. 128, *et seq.*

(a) Co. Litt. 2 b.; Sug. 884.

(b) *Roberts v. Walker*, 1 Russ. & Myl. 752.

(c) See 6 Geo. IV. c. 16; and see

now 12 & 13 Vict. c. 106, sect. 142.

(d) See sect. 37.

(e) See sect. 7. Insolvent debtors, under the 7 & 8 Vict. c. 70, seem to have been in the same position, as regards after-acquired property, as Bankrupts: see sects. 8 and 13. Query as to the effect of the new Bankruptcy Act upon the rights of assignees under the 7 & 8 Vict.?

Chapter I.

the Assignees were not affected by his certificate (*f*) : the recent Act, which repeals the Statute of Geo. IV., does not seem to contain any similar provision ; but it provides, That if any Assignee indebted to the estate of which he is such Assignee, in respect of money being part of the estate of the bankrupt retained or employed by him, become bankrupt, and obtain his certificate, it shall have the effect only of freeing his person from arrest and imprisonment, but his future effects (except tools, &c.) shall remain liable for so much of his debt to the estate of which he was Assignee as shall not be paid by dividends under his bankruptcy, and for interest at the rate of five *per cent. per annum* on the whole debt (*g*) : and it also contains clauses, which enable any creditor or Assignee of a bankrupt, to apply for the recall of the certificate on good cause shown at any time within six months after its allowance (*h*) ; or at any subsequent period, in case the same shall appear to have been obtained on false evidence, or by reason of an improper suppression of evidence, or otherwise by means of fraud (*i*).

Insolvent.

And, in the case of an insolvent under the 1 & 2 Vict. c. 110, although property acquired by him after his final discharge does not vest in his Assignees, it still remains, until his debts are paid in full (*j*), subject to the judgment which is directed by the 87th sect. to be entered up against him.

(*f*) 6 Geo. IV. c. 16, s. 127.

(*h*) Sect. 203.

(*g*) See 12 & 13 Vict. c. 106. s.

(*i*) Sect. 207.

156.

(*j*) See sect. 92.

(4.) *As to incapacities of the 2nd description affecting purchasers.*

Chapter I.

As to who are relatively incompetent to purchase.

The remarks which we have already made (*k*), as to undue personal influence, seem to be as applicable to purchasers as to vendors.

It is also a general rule in equity, that no person “who by being employed or concerned in the affairs of another has acquired a knowledge of his property” (*l*), or who, in respect of the property to be sold, has a duty to perform which is inconsistent with the duty or interest of a purchaser (*m*), shall himself purchase such property; nor shall he purchase for himself in another’s name; nor shall he himself purchase as agent for another (*n*); nor, perhaps, even employ a third person to buy as agent for another (*o*); the rule, however, is subject to particular qualifications hereinafter mentioned.

Persons filling a fiduciary character.

Nor is such a purchase rendered valid by the fact of the sale having been by auction, or before the Master under a Decree of the Court (*p*); nor, in the case of a person who by filling a confidential situation has acquired a knowledge of the property, is his capacity to purchase restored by his previous retirement from such situation (*q*); for his knowledge remains.

Purchase by, invalid, although by auction, or before the Master.

The rule has been held to apply to the several cases of

Rule affects purchases by Agents:

An agent for sale (*r*):

An agent for the management of property; who can

(*k*) Page 7.

(*r*) *York Buildings Company v.*

(*l*) Sug. 887; *Ahearne v. Hogan*,
1 Dru. 310.

(*m*) *Greenlaw v. King*, 3 Beav. 49.

(*n*) 9 Ves. 248.

(*o*) Sug. 890.

(*p*) Sug. 891.

(*q*) *Carter v. Palmer*, 8 Cl. &

Fin. 657.

Mackenzie, 8 Bro. P. C. 42; *Woodhouse v. Meredith*, 1 Jac. & W. 204; *Barker v. Harrison*, 2 Coll. 546; *Charter v. Trevelyan*, 11 Cl. & Fin. 714; *In re Bloyes' Trust*, 1 Mac. & G. 488; *et vide infra*, as to Solicitors and Agents.

Chapter I. only purchase subject to the onus of proving that he afforded his principal all the knowledge respecting its value which he derived as agent (*s*) :

Arbitrators : An arbitrator, contracting for unascertained claims of parties to the reference (*t*) :

Assignees : An assignee of a bankrupt ; against whom the rule is more than ordinarily stringent (*u*) ; and it extends to a purchase by his partner on behalf of the firm (*v*) ; the Court has, however, on the petition of a purchasing assignee, directed a reference to the Commissioners to inquire whether the purchase would be for the benefit of the estate, he paying all the costs (*w*) ; and, on the report being favourable, has confirmed the sale (*x*) : it has also, under special circumstances, allowed an assignee to be removed, at his own request, in order that he might bid at the sale of the bankrupt's estate (*y*) : where, however, an assignee, who was also second mortgagee of the property, applied for leave to bid, (remaining assignee,) the Court refused the application ; but allowed him to name a price at which he might take the property if not sold at the auction (*z*) :

Auctioneers : An auctioneer employed to sell the property (*a*) :

Bishop whose consent was required to sale. A Bishop purchasing an annuity to be charged upon a rectory ; he being the person whose consent was required to the sale ; although giving a better price than could have been elsewhere obtained (*b*) :

- | | |
|---|---|
| (<i>s</i>) <i>Cane v. Lord Allen</i> , 2 Dow. 289 ; <i>Molony v. Kernan</i> , 2 Dru. & W. 31 ; and see <i>Rossiter v. Walsh</i> , 4 Dru. & W. 485 ; <i>Murphy v. O'Shea</i> , 2 Jo. & L. 422. | <i>Turner v. Trelawny</i> , 12 Sim. 49. |
| (<i>t</i>) <i>Blennerhassett v. Day</i> , 2 Ball & B. 116. | (<i>v</i>) <i>Ex parte Burnell</i> , 7 Jur. 116. |
| (<i>u</i>) <i>Ex parte Lacey</i> , 6 Ves. 630 ; <i>Ex parte Bennett</i> , 10 Ves. 395 ; <i>Ex parte Alexander</i> , 2 Mon. & Ay. 492 ; | (<i>w</i>) <i>Ex parte Gore</i> , 6 Jur. 1118 ; 3 Mon. D. & De G. 77. |
| | (<i>x</i>) <i>S. C.</i> , 7 Jur. 136. |
| | (<i>y</i>) <i>Ex parte Perkes</i> , 3 Mon. D. & De G. 385. |
| | (<i>z</i>) <i>Ex parte Holymann</i> , 8 Jur. 156. |
| | (<i>a</i>) Sug. 887. |
| | (<i>b</i>) <i>Greenlaw v. King</i> , 3 Beav. 49. |

A Commissioner of bankrupts (*c*), although he had ceased to act in the prosecution of the fiat (*d*) :

Commissioners for Inclosure under the general Inclosure Act ; who cannot purchase *any* land in a parish in which an Inclosure is made, until five years from the date and execution of their award (*e*) : and a similar disability for the term of seven years affects valuers acting under the Commons Inclosure Act (*f*) :

The Committee of a lunatic's estate ; the Court has even refused to confirm a lease to the Committee though approved by the Master as advantageous to the estate (*g*) :

Counsel, who purchased, below their nominal value, charges upon his late client's estate (*h*), upon the validity of which he had advised :

A creditor of a bankrupt, who had been consulted by the assignees as to the best mode of selling the estate (*i*) :

Executors and administrators, in respect of the personal estate of the deceased (*j*) :

A guardian, purchasing from his ward, immediately on his coming of age ; although the price was adequate (*k*) :

A governor of a charity, taking a lease of the charity lands (*l*) :

A mortgagee with a power of sale ; who cannot purchase, under the power, either in his own name or through an agent : nor can his agent, who has acted in surveying the property and receiving the interest, purchase on his own account from the mortgagee (*m*) ; but the rule does not

(*c*) *Ex parte Bennett*, 10 Ves. 381.

(*d*) *Ex parte Baynton*, 7 Jur. 244.

(*e*) 41 Geo. III. c. 109, s. 2.

(*f*) 8 & 9 Vict. c. 118, s. 129.

(*g*) Shelf, on Lunacy, p. 446.

(*h*) *Carter v. Palmer*, 8 Cl. & Fin. 657.

(*i*) *Ex parte Hughes*, 6 Ves. 617.

(*j*) *Killick v. Flexney*, 4 Bro.

C. C. 161 ; *Watson v. Toone*, 6 Madd. 153.

(*k*) See Sug. 892.

(*l*) *Att.-Gen. v. Lord Clarendon*, 17 Ves. 491.

(*m*) *Orme v. Wright*, 3 Jur. 19 ;

In re Bloyes' Trust, 1 Mac. & G.

Chapter I.

Commissioners in Bankruptcy

Commissioners for Inclosure ;

and Valuers.

Committee of Lunatic.

Counsel.

Creditor of Bankrupt, who had advised as to sale.

Executors and administrators.

Guardians.

Governor of Charity.

Mortgagee.

Chapter I.

(Who may, however, purchase from the mortgagor.)
Permission for, to bid, whether requisite on sale in Bankruptcy.

apply to a purchase of the equity of redemption by the mortgagee from the mortgagor (*n*) ; it is, however, usual, although perhaps not strictly necessary, upon a sale under the general order in Bankruptcy, for a mortgagee intending to bid, to apply for leave so to do (*o*) ; in the case of a legal mortgage, it appears to have been a common, although improper, practice, for the mortgagee to conduct the sale (*p*) ; in such a case, of course, he could not purchase without the permission of the Court :

Rector buying glebe.

A rector, purchasing in the name of his curate a portion of glebe sold for the redemption of the land-tax (*q*) :

Solicitor to Fiat.

A solicitor to a commission of, or fiat in, Bankruptcy, purchasing the estate from the Commissioners (*r*) ; and a solicitor conducting a sale under a Decree and purchasing the estate (*s*) : and the solicitor or agent of a person disqualified from purchasing, would, it is conceived, in general, be unable to purchase on his own account (*t*) : but in a recent case, under special circumstances, the solicitor to a fiat was allowed to purchase part of the estate (*u*) :

Solicitor of disqualified purchaser.

Steward.

A steward contracting for a lease from his employer,

488 ; and see *Downes v. Grazebrook*, 3 Mer. 200.

(*n*) Sug. 888 ; and see *Waters v. Groom*, 11 Cl. & Fin. 684 ; *Knight v. Marjoribanks*, 2 Mac. & G. 10.

(*o*) Sug. 889, and cases cited. The costs of an application merely for leave to bid, are, it appears, allowed to the mortgagee only when the petition is presented at the request of the assignees ; *Ex parte Coort*, 7 Jur. 864 ; *Ex parte Danks*, 12 L. J., N. S. 45 ; *Ex parte Smith*, 13 Jur. 1044. In a case of *Ex parte Pedder*, 1 Mon. & Ayr. 327, the Court, after the sale, made an order for the mortgagee to bid, *nunc*

pro tunc ; to which Sir Edward Sugden adds a query ; but a similar order seems to have been made in the recent case of *Ex parte Yorke*, 3 Mon. D. & De G. 329.

(*p*) See *Ex parte Cuddon*, 3 Mon. D. & De G. 302.

(*q*) *Grover v. Hugell*, 3 Russ. 428.

(*r*) *Ex parte Bennett*, 10 Ves. 381.

(*s*) *Sidny v. Ranger*, 12 Sim. 118.

(*t*) *Downes v. Grazebrook*, 3 Mer. 209 ; *Whitcomb v. Minchin*, 5 Mad. 91 ; *In re Bloyes' Trust*, 1 Mac. & G. 488 ; but see *Alvanley v. Kinnaird*, 2 Mac. & G. 17.

(*u*) *Ex parte Watts*, 1 De G. 265.

to sustain which, he must show the fairness of the transaction (*w*) : Chapter I.

Trustees, unless merely such in name (*x*), can only purchase subject to special restrictions (*y*) : and there will be an additional objection to a purchase by a trustee, if the object of the trust were apparently to secure to the *cestui que trust* a continuing control over the property (*z*) : Trustees.

But, of course, the mere fact of a person having been named as a trustee will not affect his capacity to purchase, if he decline the trust *ab initio* ; and it is not essential that he should execute a deed of disclaimer (*a*) : Who have accepted trust.

A trustee whose duty it is to purchase particular property for his *cestui que trust*, (*e. g.* : a trustee of renewable leaseholds, bound, if possible, to renew,) shall never buy it for himself; even though the proposed vendor positively refuse to part with it for the benefit of the *cestui que trust* (*b*). Trustees for purchase.

But, in all the above cases, the transaction is binding on the purchaser; and voidable merely at the option of the parties originally interested in the property, or their representatives. Incompetent purchaser bound at option of parties interested.

On the other hand—

An execution creditor may buy the property sold under the execution (*c*) : Rule does not affect execution creditor.

A solicitor, generally, is under no positive disability to purchase from his client; but, if the transaction be impeached, he must prove its fairness; and that he gave his General rule as to competency of solicitor to purchase.

(*w*) See *Lord Selsey v. Rhoades*, 87, 90.

2 Sim. & St. 49; 1 Bl. N. S. 1.

(*a*) *Stacey v. Elph*, 1 M. & K.

(*x*) See *Waters v. Groom*, 11 Cl.

195.

& Fin. 684; where the question was, whether the purchaser was a Trustee or merely a creditor holding security.

(*b*) *Ex parte Bennett*, 10 Ves. 395; see *Turner v. Trelawny*, 12 Sim. 49.

(*y*) As to which, *vide infra*, p. 21.

(*c*) *Stratford v. Twynam*, Jac.

(*z*) *Scott v. Davis*, 4 Myl. & Cr. 418.

Chapter 1.

client all the information respecting the subject of the purchase which he himself possessed: but he need not have pointed out a mere speculative advantage, (such as the possibility of an unplanned, though contemplated railroad, running near the property,) which might be reasonably supposed to be equally in the knowledge of both parties (*d*): nor does the fact of the consideration having in part consisted of costs necessarily invalidate the transaction (*e*); nor does the rule extend to prevent a purchase, by a solicitor, of his client's property in respect of which he has not been professionally employed (*f*); or his purchasing by auction his client's property if he have not acted for him professionally in respect of the sale (*g*).

Son of disqualified purchaser.

The son or other relation of a trustee or other disqualified person, may purchase *bond fide* on his own account; and, although, in the case of a trustee selling to a relation, the relationship is calculated to excite suspicion, which, if confirmed by any other circumstance, it would require a very strong case to remove (*h*), the Court will, in the absence of fraud, even decree specific performance at the suit of the purchaser (*i*).

Tenant for life on sale by Trustees with his consent.

A tenant for life under a settlement, whose consent is requisite to the exercise of a power of sale by the trustees, may, nevertheless, purchase from them under the power (*k*); but this is an avowed exception from the general rule; and was so decided by Lord *Eldon*, on the ground of its being dangerous to unsettle the practice of conveyancers (*l*).

(*d*) See *Edwards v. Meyrick*, 2 Ha. 60, where the earlier cases are cited and reviewed: see *Rudd v. Sewell*, 4 Jur. 882, C.; and *Thomas v. Phillips*, 11 Jur. 80.

(*e*) *Edwards v. Meyrick*, *ubi supra*.

(*f*) 2 Y. & C. Exch. 520; 2 Ha. 68.

(*g*) *Austin v. Chambers*, 6 Cl. & Fin. 1.

(*h*) See *Ferraby v. Hobson*, 2 Ph. 261.

(*i*) Sug. 892; see *Coles v. Trecothick*, 9 Ves. 234.

(*k*) *Howard v. Ducane*, Turn. & R. 81.

(*l*) Turn. & R. 86 & 87; 3 Russ. 432.

A trustee may either simply, though expressly, hold the property in trust for others; or, although not nominally a trustee, he may yet owe duties to others in respect of it which invest him with a fiduciary character in the contemplation of the Court; or he may actually hold it in trust to effect a sale.

So, his *cestuis que trust* may be either *sui juris*, or the contrary,—as infants, married women, &c. &c.

It does not appear that the rule against purchasing affects mere dry trustees; *e. g.*: a trustee to preserve contingent remainders (*m*), or (it is conceived) a trustee to bar dower, or of a term for years assigned to attend the inheritance, or of a mere outstanding legal estate, or, in fact, a trustee of any description who cannot possibly derive in the transaction any advantage from his fiduciary character (*n*).

Nor is a trustee who comes within the restrictive rule incapable of purchasing from the *cestuis que trust*, if they be *sui juris*; but, in any such case, the Court looks at the transaction with a jealous eye (*o*); and the question to be determined is, not whether the price is fair, but whether the purchaser, having held a confidential situation previously to the purchase, has, at the time of the purchase, shaken off that character, by the consent of the *cestuis que trust*, freely given, after full information, and has bargained for the right to purchase (*p*).

So, where the sale by auction is in fact conducted by the *cestui que trust*, a purchase at an adequate price by the trustee for sale may, perhaps, be supported (*q*).

In the case of a trust for the benefit of creditors, there is little doubt that the consent of the majority will not

Chapter I.

As to purchase by Trustees—different kinds of trust.

Dry Trustees may purchase.

Purchase by active trustees from *cestui que trust* may be valid.

Test of validity.

Sale apparently by Trustee, but substantially by *cestui que trust*, whether valid.

Purchase by Creditors'

(*m*) 11 Ves. 226.

(*n*) See 1 Sim. & St. 567.

(*o*) *Davidson v. Gardner*, Sug.

(*p*) *Per* Lord Eldon, *Ex parte*

James, 8 Ves. 353.

(*q*) See *Coles v. Trecothick*, 9

Ves. 234.

Chapter I. bind the minority, so as to render valid a purchase by the trustee for sale (*r*).

Trustee, with consent of majority, invalid.

Solicitor of *cestui que trust* cannot consent to the purchase.

Resignation of trust once accepted immaterial.

Purchase in name of another suspicious.

Purchase by decree, if *cestuis que trust* are under disability.

The solicitor of a *cestui que trust* has no general authority to authorize a purchase by the trustee (*s*).

A trustee cannot get rid of his incapacity by resigning the trust or confidential situation ; for he would still retain the knowledge he had acquired while in office (*t*).

And the circumstance of a trustee or agent purchasing in the name of a third person is indicative of fraud, and the sale will more readily be set aside (*u*).

Where the *cestuis que trust* or any of them are not *sui juris*, a purchase by a trustee, who comes within the restrictive rule, can be safely effected only under an order of the Court ; which order will not be made unless to the evident advantage of the trust (*v*) ; and it is presumed that he would have to pay the costs of the suit.

Risk incurred by disqualified purchaser.

We may next consider the nature of the risk incurred by the trustee or other person purchasing while under any incapacity of the second description.

He may be forced to reconvey ;

1st, He may be required to reconvey the estate, supposing he has not sold it (*w*).

or let the estate be resold ;

2ndly, He may be obliged to let it be put up to sale, and to reconvey to another purchaser if a better can be found ; but if not to keep it (*x*).

or to account for profit if he has sold.

3rdly, If he have resold it at a profit, he may be required to account for such profit (*y*).

Sub-purchaser with notice is

And a sub-purchaser, buying with notice of the circumstances creating the incapacity in the original pur-

(*r*) Sug. 895 ; 6 Ves. 628.

Mac. & G. p. 497.

(*s*) *Downes v. Grazebrook*, 3 Mer.

(*v*) See 5 Ves. 681.

209.

(*w*) 6 Ves. 627.

(*t*) 8 Ves. 352 ; and see *Carter v. Palmer*, 8 Cl. & Fin. 657.

(*x*) *Ex parte Reynolds*, 5 Ves. 707.

(*u*) *Lord Hardwicke v. Vernon*, 4 Ves. 411 ; *In re Bloyes' Trust*, 1

(*y*) *Fox v. Macreth*, 2 Bro. C. C. 400.

chaser, is in the same predicament, if the sale be impeached (*z*).

In the first of the above cases, the purchaser will be credited with his original purchase-money and interest at £4 *per cent.*, and all sums expended by him in substantial improvements, (unless he have been guilty of actual fraud) (*a*), (as, in one case, buildings erected, and inclosures made) (*b*) or in repairs (*c*); and interest from the time of the advances; and will be debited with rents received by him, an occupation rent for any part occupied by himself (*d*), and his receipts for the sale of timber, &c., with interest; and also with the estimated amount of deteriorations, (if any) (*e*); and on receiving the balance, (if in his favour,) he must reconvey.

And if nothing appear to be due to him, he must give up his purchase without receiving any further consideration (*f*).

In making the above estimates, buildings pulled down, will, if incapable of repair, be valued as old materials, but otherwise as buildings standing (*g*).

Where the decree directs a reconveyance, and an account and payment of the balance to the purchaser, but does not in terms give him a lien for such balance upon the estate, the reconveyance must be made at once, without waiting for the accounts (*h*).

The estate, if put up for resale, will be put up at the amount of balance due to the purchaser, ascertained as just

Chapter I.

similarly
liable.

Terms upon
which a re-
conveyance
will be
decreed.

What
expenses
allowed.

Profits to be
accounted
for.

If nothing
due to him
he must at
once recon-
vey.

What allow-
ances for
buildings
pulled down.

Must re-
convey at
once unless
decree gives
him a lien
for balance
due.

Terms on
which estate
will be re-
sold.

(*z*) Sug. 899.

(*a*) *Baugh v. Price*, 1 Wils. 320;

see *Howell v. Howell*, 2 Myl. & Cr. 478; and *Turner v. Trelawny*, 12 Sim. 49.

(*b*) *York Buildings Company v. Mackenzie*, 8 Bro. P. C.; see pp. 56 and 71.

(*c*) Necessary repairs are allowed

for, even in cases of fraud; 1 Wils. 322.

(*d*) *Ex parte James*, 8 Ves. 351.

(*e*) *Ex parte Bennett*, 10 Ves.;

see p. 401.

(*f*) *Greenlaw v. King*, 3 Beav. 63.

(*g*) *Robinson v. Ridley*, 6 Madd. 2.

(*h*) *Trevelyan v. Charter*, 9 Beav.

140.

Chapter I.

If no advance, purchaser must keep it.

At what amount put up.

Cannot be re-allotted for sale.

Purchaser having more than repaid himself must account for the balance.

Purchaser paying money into Court not affected by variation in funds.
General rule as to costs.

mentioned (*i*), and, if there be no advance, he must keep the estate : in a modern case, where permanent improvements had been made, it was put up at its improved value, subject to the question whether he should be allowed the amount of such improvements (*j*).

In the case of a resale, the *cestuis que trust* cannot, if the estate were bought in one lot, insist on its being put up in several lots (*k*), nor, it is conceived, allotted otherwise than as it was bought ; to effect the change they must take it off the purchaser's hands on the terms we have already mentioned (*l*).

The third rule would extend to a purchaser who, by sale of wood, minerals, &c., had more than repaid himself his purchase money, expences, and interest (*m*) ; or who had made a similar profit by merely letting the property, (which in the case of unexpected public improvements might often easily happen in the course of a few years, although the original price were perfectly fair ;) it is apprehended, that, in either of these cases, he would have, not only to reconvey, but also to pay the balance found due from him (*n*).

If, in any of the above cases, the purchaser has paid purchase-money into Court, and it has been invested, he will neither gain nor suffer by a rise or fall in the funds (*o*).

And, as a general rule, a trustee, though free from fraud, must pay the costs of a suit occasioned by his improper dealing with the estate (*p*) : such is the almost invariable practice where the *cestuis que trust* are infants (*q*) ; in other

(*i*) *Vide supra*, p. 23 ; *Ex parte Hughes*, 6 Ves. 617.

(*j*) *Williamson v. Seaber*, 3 Y. & C. 717.

(*k*) 8 Ves. 351.

(*l*) *Supra*, p. 23.

(*m*) *York Buildings Company v. Maekenzie*, 8 Bro. P. C. see p. 71.

(*n*) *S. C.*, and see 6 Ves. 622 ; and the decree in *Neesom v. Clarkson*, 2 Ha. 176 ; 4 Ha. 97.

(*o*) 8 Ves. 351.

(*p*) Sug. 898.

(*q*) See *Sanderson v. Walker*, 13 Ves. 601.

cases, however, the rule is sometimes relaxed where the trustee is free from all moral blame (*r*); and in one instance it would seem that he was even allowed to receive a sum on account of costs (*s*).

But a *cestui que trust* wishing to impeach a sale must do so within a reasonable time (*t*); which generally is less than the time allowed by the Statute of Limitations: a delay of eighteen years has been held to amount to an implied confirmation of the transaction (*u*); ten years have been allowed in the case of an individual (*v*); and twelve in the case of creditors (*w*); but the general tendency of modern decisions is still further to discourage stale demands; a longer time, however, is allowed a class of persons, as creditors, than would be allowed an individual (*x*).

And time will not run against a *cestui que trust* until he be *sui juris* (*y*), and aware that the trustee was improperly the purchaser (*z*); nor will it, in general, run against him, so long as his interest is contingent, or reversionary (*a*), or (in particular) dependent on the will of the purchasing trustee, or of a party implicated in the breach of trust (*b*): it does not appear that the poverty of the *cestui que trust* is in itself an excuse for *laches* (*c*), although it would, probably, have an effect upon the Court if united with other circumstances (*d*).

Chapter 1.

Time allowed for impeaching sale.

Classes more favoured than individuals.

From what period time begins to run.

(*r*) *Baker v. Carter*, 1 Y. & C. Ex. 250.

(*s*) See *Downes v. Grazebrook*, 3 Mer. 209.

(*t*) 1 Jac. & W. 59; *Lord Selsey v. Rhoades*, 1 Bli. N. S. 1; *Rudd v. Sewell*, 4 Jur. 882, C.

(*u*) *Gregory v. Gregory*, G. Coop. 201; Jac. 631.

(*v*) *Hall v. Noyes*, cited 3 Ves. 748.

(*w*) *Anon.* cited 6 Ves. 632.

(*x*) *Whichcote v. Lawrence*, 3 Ves. 740.

(*y*) *Lewin on Trusts*, 371; *Camp-*

bell v. Walker, 5 Ves. 678, 682.

(*z*) *Chabner v. Bradtey*, 1 Jac. & W. 51; *Charter v. Trevelyan*, 11 Cl. & Fin. 714.

(*a*) *Duke of Leeds v. Lord Amherst*, 2 Ph. 117; *Bennett v. Colley*, 5 Sim. 181; *Bower v. Evans*, 1 Jo. & L. 178; *Roberts v. Tunstall*, 4 Ha. 257.

(*b*) *Roberts v. Tunstall*, 4 Ha. 257.

(*c*) *S. C.*

(*d*) *Gregory v. Gregory*, G. Cooper, 201; and see *Oliver v. Court*, 8 Pri. 168.

Chapter I.

Confirmation of voidable purchase, requires to.

Lastly, a *cestui que trust* may confirm a voidable purchase by his trustee, &c. ; but, to make his confirmation binding, he must be *sui juris* (e), fully aware of the material facts (f), and that he can, if he please, impeach the transaction (g) ; he must be under no undue influence (h), the confirmation must be a solemn and deliberate act (i), free from any pressure resulting from the original transaction (j), and, in the case of a plurality of *cestuis que trust*, it must, to be effectual, be the act of all (k), as a majority cannot bind the minority.

Distinctions between prior acquiescence and subsequent confirmation.

And we may here remark, that conduct, or language, on the part of a *cestui que trust* who is *sui juris*, and which, if it had occurred upon or previously to the commission of the breach of trust might have amounted to acquiescence, and have precluded him from all right of complaint, may, if it occur subsequently to the breach of trust, be wholly insufficient to confirm the transaction, or to release the trustee from liability (l).

(e) *Campbell v. Walker*, 5 Ves. 678, 682.

(f) *Chalmer v. Bradley*, 1 Jac. & W. 51 ; see *Wedderburn v. Wedderburn*, 4 Myl. & Cr. 41.

(g) 1 P. Wms. 727.

(h) *Lewin on Trusts*, 374.

(i) *Carpenter v. Heriot*, 1 Ed. 338 ; see *De Montmorency v. Devereux*, 7 Cl. & Fin. 188.

(j) *Wood v. Downes*, 18 Ves. 128.

(k) 6 Ves. 628.

(l) 5 Myl. & Cr. 218 ; and see 2 Ph. 123.

CHAPTER II.

Chapter II.

AS TO SALES BY FIDUCIARY VENDORS.

1. *As to the time of sale.*
2. *The manner of sale.*
3. *The consideration.*
4. *General points relating to sales by fiduciary vendors.*

UNDER the term, fiduciary vendors, we may comprise agents for sale, assignees of bankrupts and insolvents, mortgagees with powers of sale, persons selling under the special authority of Railway and other Acts of Parliament, and, in particular, of the Lands Clauses Consolidation Act, 1845, (and who may be conveniently described by the general appellation of statutory owners,) and, lastly, trustees selling in pursuance of either an express trust or only a permissive power;—the term, trustees, being also held to include executors, when selling freeholds or copyholds in exercise of a power expressed or implied, and personal representatives generally, when selling the chattels real of their testator or intestate.

On sales by
Fiduciary
Vendors.

We may consider sales by such vendors, with reference to the questions, When ought they to sell? How ought they to sell? and, For what price ought they to sell? and then refer to some points which cannot conveniently be classed under any of the above heads.

As to time,
considera-
tion for, and
manner of
sale.

(1.) *When ought they to sell?*

As to time
for sale.

An agent for sale, should, subject to a reasonable exercise of discretion, sell with all convenient speed.

By agents.

Chapter II.

Assignees of Bankrupts: single Creditor may insist on sale.

Assignees of a bankrupt should also sell without any unnecessary delay (*a*) ; and any single creditor may insist on a sale ; and, if he so insist, it is doubtful whether the Court can refuse its assent (*b*) ; until creditors' assignees are chosen, the official assignee alone may sell under the order of the Court, if the Court consider that delay would be prejudicial to the bankrupt's estate ; after creditors' assignees are chosen, the official assignee is not to interfere in directing the time or manner of effecting a sale (*c*).

Assignees of Insolvent.

An assignee of an insolvent, under the 1 & 2 Vict. c. 110, must, in the absence of special direction by the Court, sell, if practicable, within six (lunar) months after his appointment (*d*) ; but a sale is not necessarily invalid by reason of its being made after such period has elapsed (*e*).

Mortgagees.

A mortgagee with power of sale may sell without waiting for the concurrence of the mortgagor ; nor does a stipulation in the mortgage deed that the mortgagor shall, if required, join in any sale, entitle a purchaser to require his concurrence (*f*).

Statutory owners.

Statutory owners must, of course, sell within such limits (if any) as to time as are prescribed by the Act under which they derive their powers ; the Lands Clauses Consolidation Act, 1845, seems to impose no restriction as to time upon the purchase of lands by agreement ; although it limits the time for compulsory purchases by the Company to a period of three years from the passing of the special Act, unless some other period be therein prescribed (*g*) ; and it would seem that, in the absence of restric-

(*a*) *Ex parte Goring*, 1 Ves. jun. 169. 7 & 8 Vict. c. 96, s. 10.

(*b*) *S. C.* ; and see 6 Ves. 622 ; (*d*) See s. 47 ; and see last note.
Ex parte Miller, 1 Mon. D. & De G. 44. 352 ; *Cole v. Coles*, 6 Hare, 517.

(*c*) 12 & 13 Vict. c. 106, s. 40 ; 344.
and as to estate of Insolvents petitioning under 5 & 6 Vict. c. 116, see

(*f*) *Corder v. Morgan*, 18 Ves.

(*g*) L. C. C. Act, 1845, sect. 123.

tion, even a compulsory power could be exercised without reference to lapse of time (*h*). It is sufficient if the Company, within the limited period, give notice of their intention to take the lands, and summon a jury to assess their value (*i*).

Trustees for sale are not, by the usual direction to sell with all convenient speed, precluded from exercising a reasonable discretion as to the time of sale; nor need one co-trustee adopt the opinion of another (*j*).

Trustees for sale.

It is laid down that, in the absence of any special direction, trustees for sale, should, subject to a reasonable exercise of discretion, sell with all convenient speed (*k*); in practice, however, trustees of a will or settlement are not generally considered bound, under the ordinary trust for sale, nor is it usual for them, to sell, except upon the request of some one or more of their *cestuis que trust*, or under circumstances which render a sale necessary or expedient (*l*); or unless the property is not of a permanent character: after a bill is filed for the administration of the trust, trustees cannot sell without leave of the Court (*m*); it was, however, held by the Court of Queen's Bench, in a recent case, that the power of an *executor* to make a good title to the chattels real of the testator is not affected by the existence of an administration suit, so long as there is no decree (*n*).

Whether bound to sell immediately.

(*h*) *Thicknesse v. Lancaster Canal Company*, 4 Mee. & W. 472.

(*i*) *Brocklebank v. Whitehaven Junction Railway Company*, 15 Sim. 632; and see *Reg. v. Birmingham and Oxford Junction Railway Company*, 15 L. T. 392.

(*j*) *Buxton v. Buxton*, 1 Myl. & Cr. 80; but see *Taylor v. Tabrum*, 6 Sim. 281. It has been recently held, by the Vice-Chancellor of England, that surviving trustees can make a good title and receive the purchase-

money, although the trust-instrument directs any vacancy to be filled up within a specified time which has elapsed; *Warburton v. Sandys*, 14 Sim. 622; *sed qu.*

(*k*) Sug. 57.

(*l*) Davidson's Conv. vol. iv. p. 342, n.

(*m*) *Walker v. Smalwood*, Amb. 676.

(*n*) *Neeves v. Burrage*, 14 Jur. 177, *sed qu.*

Chapter II.

Trustees under power of sale.

Trustees of a power of sale, with the usual trusts for re-investment in real estate, ought not to sell except for some good reason (*o*): the Court, however, will not control a *bond fide* exercise of their discretion (*p*); but a sale by a Trustee, after a *cestui que trust* has become absolutely entitled to the property, is *prima facie* invalid (*q*).

Time fixed by author of trust, cannot be anticipated, although delay be prejudicial.

When the instrument creating the trust fixes the time for sale, this cannot be anticipated either by the trustees or the Court, however ruinous the delay may be to the estate: *e.g.*; where a testator directed an advowson to be sold *upon the death of A. the incumbent*, the Court held that it had no jurisdiction to sell in A.'s lifetime, although upon his death it would be necessary to present a new incumbent before any sale could be effected (*r*).

Reversion may be sold under trust in settlements, although rights of parties are thereby altered.

And, on the other hand, where a settlement of a reversion, in terms authorized a sale at any time with the consent of the tenant for life under such settlement, it was held that the trustees might proceed to an immediate sale, although its effect would be, under the trusts declared of the purchase-money, to vary the rights of the *cestuis que trust* by giving such tenant for life an immediate income (*s*).

Conditional powers of and trusts for sale.

Powers of and trusts for sale are often exercisable only under certain specified conditions; when this is the case, and a sale is made in breach of a condition, the purchaser's safety would seem to depend upon the following considerations, viz.: 1st, whether the condition is subsequent or precedent; and 2ndly, whether it affects the title to the

Subsequent and precedent condition.

(*o*) Sug. 62.

(*p*) 2 Sug. Pow. 470; as to the validity of a power of sale, with reference to the rule against perpetuities, see *Wood v. Wood*, 4 Myl. & Cr. 460; *Nelson v. Callow*, 15 Sim. 353; and cases cited.

(*q*) *Jefferson v. Tyrer*, 9 Jur. 1083, V. C. E.

(*r*) *Johnstone v. Baber*, 8 Beav.

233; see *Blacklow v. Laws*, 2 Hare, 40; *Gosling v. Carter*, 1 Coll. 652.

(*s*) *Clark v. Seymour*, 7 Sim. 67; and see *Tasker v. Small*, 6 Sim. 625; *Blackwood v. Borrowes*, 4 Dru. & War. 441; *Giles v. Homes*, 15 Sim. 359.

legal estate: if it merely affect the equitable title, an apt declaration in the instrument creating the trust or power will protect a purchaser against the nonperformance of a precedent (*t*), and, *a fortiori*, of a subsequent condition; as in the case of an ordinary power of sale in a mortgage, which usually contains a precedent condition that certain notices shall have been given, and defaults made in payment: but with a declaration relieving purchasers from liability for a breach of such condition: if, on the other hand, the exercise of a power is to affect the legal estate, as where land is limited in strict settlement, and a power is given to trustees, in certain specified events, to sell, and, for that purpose, to revoke the old and appoint new uses, here, unless the required events occur, the old limitations remain unaffected, notwithstanding any attempted exercise of the power; and any declaration that purchasers shall not be bound to see that the events have happened, would, it is conceived, be inoperative (*u*).

Chapter II.

Legal estate.

Difficulty where legal title depends on exercise of power subject to precedent condition.

A tenant for life, under a will, of the proceeds of sale of estates directed to be sold with all convenient speed, will, from the end of twelve months after the testator's decease, be entitled to the rents of the estates, although they remain unsold (*v*).

Right of tenant for life to rents of estate directed to be sold.

(2.) *How ought they to sell?*

An agent or trustee, simply authorized to sell by public auction for a given sum, cannot, whatever may be the price offered, sell by private contract (*w*).

As to the manner of sale.

Power to sell by auction, does not authorize sale by private contract.

And an express authority to sell by private contract, would not, it is conceived, justify a sale by auction (*x*);

Whether power to sell by pri-

(*t*) 2 Sug. Pow. 473.

K. 500.

(*u*) See, as to the construction of a discretionary trust for sale, *Lord Rendlesham v. Meur*, 14 Sim. 249.

(*w*) *Daniel v. Adams*, Amb. 495; *In re Loft*, 8 Jur. 206, C.; Sug. 56.

(*v*) *Vickers v. Scott*, 3 Myl. &

(*x*) See and consider *Daniel v. Adams*, Amb. 495.

Chapter II.

vate contract, authorizes sale by auction.

Power to sell to A. does not authorize sale to B.

As to mode of sale by Assignees of Bankrupt;

or Insolvent;

or Mortgagees, Trustees, or Agents.

Estate may be sold in parcels.

unless the authority were to sell for a given sum, and the price obtained at the auction (after payment of the incidental expenses) exceeded or equalled that amount.

Nor does an authority to sell to A. for a given sum, necessarily justify a sale to B. for that (or, it is conceived, any greater) sum (*y*).

The assignees of a bankrupt may, although they incur a risk in so doing, sell by private contract; and they are justified in selling in lots (*z*); we may here remark, that a sale under the general order in Bankruptcy should be conducted by the assignees, and not by a mortgagee (*a*).

The assignees of an insolvent, under the 1 & 2 Vict. c. 110, (see s. 47,) must, if practicable, sell by public auction, in such manner, and at such place or places as shall be directed by the creditors: if, however, they ineffectually attempt to sell by auction, they can, after the expiration of the time (six lunar months) limited by the Act, sell by private contract, with the consent of the major part in value of the creditors present at a meeting duly convened for the purpose (*b*): nor is the sale necessarily invalid by reason of the directions of the creditors as to the manner of sale not having been strictly complied with (*c*).

Mortgagees, trustees, and agents for sale, may, in the absence of restriction, sell by private contract or public auction (*d*); they should, however, as a general rule, unless specially authorized to sell by private contract, sell by auction, to avoid questions with their beneficiaries, as to whether the price obtained was adequate.

They may also, as a general rule, sell either altogether or in parcels (*e*); subject, of course, to a liability to be

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|---|---|
| (<i>y</i>) <i>Bul teal v. Lord Abinger</i> , 6 Jur. 410, V. C. W. | 352. |
| (<i>z</i>) See Sug. 56. | (<i>c</i>) <i>Wright v. Maunder</i> , 4 Beav. 512. |
| (<i>a</i>) <i>Ex parte Cuddon</i> , 3 Mon. D. & De G. 302; L. C. | (<i>d</i>) Sug. 56. |
| (<i>b</i>) <i>Mather v. Priestman</i> , 9 Sim. | (<i>e</i>) Sug. 56. It would appear that a trust for sale of "any part of" an |

Chapter 11.

But not in undivided shares ;
semble,

standing timber, &c., must be sold with the fee.

Sales, and proposed alterations in, should be duly advertised.

Oppressive sale by mortgagee not necessarily invalid.

called to account in Equity if they adopt a mode of sale which is clearly depreciatory : but it may be doubted whether, even at Law, a power (*f*) of sale, extending to the entirety of an estate, would be well exercised by a sale of an undivided share : and it has been decided that trustees for sale under a settlement must sell the standing timber with the estate, although the tenant for life be unimpeachable of waste (*g*) ; and that a sale of the estate, apart from the timber, is void at Law (*h*) : the same doctrine would, it is conceived, in ordinary cases, apply to a reservation of minerals, or any other part of the inheritance, upon a sale by fiduciary vendors (*i*).

They are also bound to use all reasonable diligence to obtain a fair price (*j*) : if, therefore, they sell by auction, they should give due notice of and advertise the sale : and if the estate have been advertised to be sold in one particular manner, (as in lots), they should not sell in any other way, (as altogether, or under a different plan of allotment,) without re-advertising the sale in accordance with the proposed alterations (*k*).

A harsh and improvident sale by a mortgagee, will not, however, be set aside in Equity, if clearly within the terms of the power ; nor will a mere offer, unaccompanied by actual tender, of the amount due to him, be sufficient to prevent a sale (*l*) : where, as is usually the case, the

estate, at the discretion of the trustees, would authorize a sale of the entirety. *Lord Rendlesham v. Meux*, 14 Sim. 249 ; see *Cooke v. Farrand*, 7 Taunt. 122.

(*f*) *Chance on Powers*, 2441.

(*g*) *Cockerell v. Cholmeley*, 1 Russ. & M. 418.

(*h*) *Cholmeley v. Paxton*, 3 Bing. 207 : see a case of *Silvester v. Bradley*, 13 Sim. 75, where it was, unsuccessfully, contended that the inheritance

of the timber was, in equity, severed from the inheritance of the soil ; and *Butler v. Borton*, 5 Madd. 40.

(*i*) But not (it is conceived) to a reservation of *Mines*, on sales to Railway or Waterworks Companies ; see 8 Vict. c. 20, s. 77, and 10 Vict. c. 17, s. 18.

(*j*) 3 Mer. 208.

(*k*) *Ord v. Noel*, 5 Madd. 438 ; see p. 441.

(*l*) See *Matthie v. Edwards*, on

Chapter II.

power is exerciseable only upon notice, a contract for sale is not invalid by reason of its being entered into before the expiration of notice duly given (*m*) : but where the equity of redemption has been incumbered, and the power does not contain the usual clause making an irregular sale valid as in favour of a purchaser, a sale without the required notice is invalid as against the subsequent incumbrancers, even although the mortgagor expressly waive the notice and consent to the sale (*n*).

Sale under depreciatory conditions, improper.

Fiduciary vendors are not, without special authority, justified in selling under any unnecessary and depreciatory special conditions, (such as a condition that the purchaser shall take, at a valuation, fixtures belonging to a third person,) or conditions unnecessarily restrictive of the purchaser's right to a marketable title; it is by no means clear that, under such circumstances, they can make a title which a purchaser can be advised to accept (*o*).

Trustees, &c., employing agent, are responsible for his acts.

If they employ an agent to sell, or confide the sale to a co-trustee, &c., they will be responsible for his acts (*p*).

Sale with consent, what consent sufficient.

It seems to be doubtful whether, when a power of sale is exerciseable only with a specified consent, a general prospective consent is sufficient; or whether there must not be a consent to the particular sale; also, whether consent given after the execution of the power is sufficient (*q*) : we

appeal, 11 Jur. 761; and (as *Jones v. Matthie*) 11 Jur. 504, reported below, 2 Coll. 465 : and see *Grugeon v. Gerrard*, 4 Y. & C. 119. Money paid for expenses by mortgagor to mortgagee's solicitor, under a threat of an exercise of a power of sale, but not really due, may, it seems, be recovered at Law; *Close v. Phipps*, 7 Man. & Gr. 586.

(*m*) *Major v. Ward*, 5 Ha. 598; which also see, as to mode of giving notice : notice of dissolution of a partnership has been held good,

although the party served was a lunatic; and the Court said, it would have been good had he been totally blind and deaf; *Robertson v. Lockie*, 10 Jur. 533, V. C. E.; but see other cases there referred to.

(*n*) *Forster v. Hoggart*, 15 L. T. 134, Q. B.

(*o*) 1 Mer. 268; 3 Dav. Conv. 95.

(*p*) 1 Atk. 87.

(*q*) See Chance on Powers, 727 to 737; and *Att.-Gen. v. Sitwell*, 1 Y. & C. Ex. 559 : as to the question whe-

have seen that a consent is not necessarily invalid by reason of its effect being to benefit the consenting party (*r*).

(3.) *As to the price for which they should sell:—*

As to the consideration, they must sell for gross sum.

They must sell for a gross sum of money, unless any other consideration be specially authorized: for instance, a sale in consideration of a rent charge (*s*) or annuity is invalid (*t*). Statutory owners under the Lands Clauses Consolidation Act (*u*) are expressly restricted to a sale for a gross sum. *Lord Ash v. Lord Leigh*.

They should use all reasonable diligence (*v*), as if the estate were their own, to obtain a fair price; and therefore, of course, should ascertain its value, even at the expense of a valuation, where circumstances seem to render such a course expedient; if bound to sell by auction, or, perhaps, in any case, they cannot safely, without special authority, fix a reserved bidding (*w*): but such authority, if possessed, should be exercised; or, if wanting, should, if practicable, be obtained.

And may have estate valued.

But cannot, safely, without authority, fix a reserved bidding; *semble*,

It has been recently held by Lord *Langdale*, that the assignee of an insolvent, selling by auction at a price below the sum fixed by the creditors for a reserved bidding, could make a good title to a purchaser; but that he was answerable to the creditors if the discretion which he had exercised was improper (*x*).

Assignee of Insolvent selling below reserved price, can make title.

ther the consenting power of a tenant for life is affected by the alienation of, or incumbrances on, his life estate, see 5 Jarm. Conv. by Sweet, 161, *et seq.*; *Warburton v. Farn*, 16 Sim. 625; and *Lord Leigh v. Lord Ashburton*, 11 Beav. 470, (where the life estate was subject to judgments,) and cases cited.

(*r*) *Clark v. Seymour*, 7 Sim. 67, *supra*, p. 30.

(*s*) *Read v. Shaw*, 2 Sug. Pow. Appendix.

(*t*) *Reid v. Shergold*, 10 Ves. 370, 381.

(*u*) Sect. 10.

(*v*) Sug. 57.

(*w*) *Taylor v. Tabrum*, 6 Sim. 281: see *in re Hamlet*, 7 Jur. 660; where leave was given to Assignees in Bankruptcy to fix such reserved bidding as the Commissioner might approve.

(*x*) *Wright v. Maunder*, 6 Jur. 71; 4 Beav. 512.

Chapter II.

Biddings may be opened in Bankruptcy.

It appears (*y*) that the biddings for an estate sold in Bankruptcy may be opened before conveyance, upon terms similar to those on which biddings are opened in Chancery (*z*); and the practice, although disapproved of by Sir *E. Sugden* (*a*), has been followed by V. C. *K. Bruce* in a recent case (*b*).

Fiduciary vendors not responsible for loss on sale by auction.

As a general rule, fiduciary vendors, selling by auction, and using all proper precautions to effect an advantageous sale, incur no responsibility should the estate sell below its value; and Equity will even help the purchaser to his bargain (*c*).

Statutory owners cannot fix price.

Under the Lands Clauses Consolidation Act, statutory owners have no power to fix the price; this must be determined either by a jury, or arbitration, or valuation (*d*); it is conceived, however, that a company agreeing with a statutory owner to purchase at a certain price, is bound, if such price be subsequently ascertained, in manner prescribed by the Act, to be a fair value for the land (*e*).

As to sales to Railway Companies, &c., by trustees under mere discretionary power; costs of re-investment.

Where real property is settled in the usual way, with a tenancy for life, and a discretionary power of sale in trustees, and a trust for reinvestment of the purchase-money in land, it may be a question whether the trustees could be advised to exercise the power for the purpose of a sale under the Lands Clauses Consolidation Act, except under a special stipulation that the company shall bear the costs of reinvesting the purchase-money, in the same way as if the sale had been made by the tenant for life under the statutory power (*f*); or with an increase of purchase-money, as a special compensation for such costs.

(*y*) *Ex parte Hutchinson*, 2 Mon. & Ay. 727; *Ex parte Partington*, 1 Ball & B. 209.

(*z*) *Infra*, Ch. XIX.

(*a*) *Sug*. 61.

(*b*) *Ex parte Lee*, 12 Jur. 995.

(*c*) 5 Madd. 440.

(*d*) Sect. 9.

(*e*) See *Frend & Ware's Railway* Conv. 69.

(*f*) See sect. 80.

Municipal Corporations can, under the above Act, sell only with the consent of the Treasury (*g*). Chapter II.

If the assignee of a bankrupt, being unauthorized by the creditors, buy in the estate, he will, unless they subsequently sanction the step, be deemed a purchaser on his own account (*h*): and where the assignees put up the estate in two lots, and bought in both without authority, and, on a resale, there was a loss upon lot A., but a gain upon lot B., they were charged with the loss, and were not allowed to set off the gain (*i*).

And trustees for sale, mortgagees, and agents, cannot, without incurring a risk of being held liable for any consequent loss, buy in the property, or annul a contract for sale without special authority so to do (*j*).

Sale by municipal corporations.

Assignee buying in estate is liable to be held the purchaser.

And cannot set off excess on resale of one lot, against deficiency on resale of another.

Trustees, &c., buying in or rescinding contract liable for loss; *semble*.

(4.) *As to general points relating to sales by fiduciary vendors.*

As a general rule, fiduciary vendors must show a marketable title, and are in all respects liable to a purchaser as if they were absolute and beneficial owners (*k*); except that they ordinarily enter into no covenants for title beside the

Fiduciary vendors; their general liability; as to covenants,

(*g*) Sect. 15 of Act.

(*h*) *Ex parte Lewis, Ex parte Buxton*, 1 Gl. & Jam. 69 & 355: see *Ex parte Cuddon*, 7 Jur. 334; S. C. 3 Mon. D. & De G. 302: and see *Ex parte Tomkins*, Sug. Appendix, No. IX.

(*i*) *Ex parte Lewis*, 1 Gl. & Jam. 69. The mere putting up a lease to sale by assignees who have not taken possession, without describing it as having belonged to the bankrupt, or as belonging to themselves, will not fix them as assignees of the lease, if not knocked down; *Turner v. Richardson*, 7 East, 335; *sed contra*, if a sale be effected and a deposit paid,

although the contract subsequently go off; unless, perhaps, it be clearly shown that it could not have been enforced; *Hastings v. Wilson*, Holt's N. P. Ca. 290. As to the lessor's right to compel assignees of bankrupts or insolvents to elect whether they will accept or decline the lease, see 6 Geo. IV. c. 16, s. 75; 12 & 13 Vict. c. 106, s. 145; 1 & 2 Vict. c. 110, s. 50; 7 & 8 Vict. c. 96, s. 12.

(*j*) *Taylor v. Tabrum*, 6 Sim. 281; *Hill on Trustees*, 492; but see Sug. 58.

(*k*) Sug. 61, 63; *McDonald v. Hanson*, 12 Ves. 277.

Chapter II. covenant against incumbrances (*l*): and their liability and costs. extends to costs in a suit for specific performance; they have, however, a general right, except in cases of misbehaviour, to recover such costs from the estate of their beneficiaries.

Trustee of legal estate must convey to trustees for sale of equitable estate.

Where an equitable fee is conveyed to trustees for sale, the trustee of the outstanding legal estate must convey it to them without requiring the concurrence of their *cestui que trust*; but if he do more than merely so convey, he will be responsible for any breach of trust which he may thus facilitate (*n*).

Sale by trustees, rarely restrained by injunction.

It is only upon strong grounds, and where irreparable injury is likely to be sustained by the parties interested, or a clear breach of trust is about to be committed, that the Court will, by injunction, stop an intended sale by fiduciary vendors (*n*).

Person assuming to act as trustee, and signing receipt for purchase-money, liable.

We may here remark, that if a person, either rightfully or wrongfully, assume to act as trustee for sale, and in that character sign a receipt for purchase-money, he will be answerable for it, whether he himself receive, or allow it to be received by a stranger (*o*).

(*l*) See Hill on Trustees, 269; *Worley v. Frampton*, 5 Hare, 560; *vide infra*, Ch. XII.

(*m*) *Angier v. Stannard*, 3 Myl. & K. 566, 567.

(*n*) See *Ex parte Montgomery*, 1 Gl. & J. 338; *Marshall v. Sladden*, 7 Ha. 428.

(*o*) *Rackham v. Siddall*, 1 Mac. & G. 607.

CHAPTER III.

Chapter III.

AS TO THE RELATIVE DUTIES OF VENDORS AND
PURCHASERS PRIOR TO THE SALE.

1. *As to the disclosure or concealment of defects, incumbrances, &c. by the vendor.*
2. *As to commendatory and other similar statements by vendor.*
3. *As to the disclosure or concealment of advantages by purchaser.*
4. *As to depreciatory remarks or conduct by purchaser.*

WE may next advert to some general rules as to the relative duties of intended vendors and purchasers before entering into an agreement for sale: they relate to—

Preliminary negotiations; rules to be observed in.

1st. The disclosure or concealment of defects, incumbrances, &c., by a vendor:

2ndly. Commendatory and other similar statements by a vendor:

3rdly. The disclosure or concealment of advantages by a purchaser:

4thly. Depreciatory remarks or conduct by a purchaser.

- (1.) *As to the disclosure or concealment of defects, incumbrances, &c., by a vendor.*

As to disclosure or concealment of defects, incumbrances, &c., by vendor.

Defects in an estate may be either *patent*, that is, such as might be discovered by ordinary vigilance on the part of a purchaser; *e. g.* the existence of an open footpath over

Vendor need not point out *patent* defect.

Chapter III. the property (*a*), or the ruinous state of buildings (*b*) ; or *latent*,—that is, such as the greatest attention (*c*) would not enable him to discover ; *e. g.* the existence of defects in a ship's bottom when sold afloat (*d*) : it is held that a vendor is not bound to point out *patent* defects (*e*).

But must not conceal or divert attention from it.

But he must not, either during a treaty for, or while intending, a sale, endeavour to conceal a defect, or to divert a purchaser's attention from it : in neither case, if proved, can he enforce the agreement in Equity (*f*) : and in the first, (as where a vendor, about to sell a house, purposely plastered and papered over a defect in the main wall (*g*),) the purchaser may recover his deposit at Law : and this, although the estate be sold "with all faults (*h*)."

Vendor selling by agent and not communicating to him material defect, allowed to enforce contract at law.

But at Law, where the plaintiff, knowing that a nuisance existed which rendered his house unfit for a residence, employed an agent to dispose of it, without mentioning to him the nuisance, and the agent, upon being asked by the intended lessee whether there were any objection to the house, replied that there was not ; a majority of the Court held, that this was no defence to an action for breach of the agreement to take the house (*i*) ; inasmuch as the plaintiff made no false representation, and the agent, although he made one, did not know it to be false.

But vendor not disclosing latent defects cannot enforce specific performance.

But, in a suit for specific performance, the decision would doubtless have been in favour of the lessee ; and, in fact, a vendor cannot, although the estate be sold subject to all

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| (<i>a</i>) <i>Oldfield or Bowles v. Round</i> , 5 Ves. 508. | <i>Attwood</i> , You. 490. |
| (<i>b</i>) <i>Grant v. Munt</i> , Coop. 177. | (<i>g</i>) 4 Taunt. 785. |
| (<i>c</i>) Sug. 383. | (<i>h</i>) <i>Schneider v. Heath</i> , 3 Camp. 506. |
| (<i>d</i>) See <i>Mellish v. Motteux</i> , 1 Pea. Ca. 156. | (<i>i</i>) <i>Cornfoot v. Fowke</i> , 6 Mee. & W. 358 ; and see <i>Wilson v. Fuller</i> , 3 Ad. & E., N. S. (in error) 68 ; 3 Gale & D. 570. |
| (<i>e</i>) Sug. 2. | |
| (<i>f</i>) Sug. 2 ; see <i>Shirley v. Stratton</i> , 1 Bro. C. C. 440 ; <i>Small v.</i> | |

faults (*j*), rely on the aid of a Court of Equity, if he omit to disclose a *latent* defect which the purchaser has no means of ascertaining (*k*).

As to incumbrances and defects in title:—A vendor must produce to the purchaser all documents of title in his possession (*l*) or power; and inform him of all material facts not apparent thereon (*m*); but he need not direct attention to defects, &c., apparent on the title deeds (*n*); or to any matter of which the purchaser has actual or implied notice; for instance, upon the sale of leaseholds (*o*) the stringent or unusual character of the covenants need not be mentioned; as notice of the lease is notice of its contents; but there must, of course, be no misrepresentation (*p*) upon the subject, nor any artifice to divert attention.

And it may, perhaps, be doubted, whether the above rule as to notice, (general as are the terms in which it is laid down (*q*),) would, if the question arose in a suit for specific performance, be held to apply so as to affect the purchaser with notice of any matter in a lease which is not in its nature incidental to such an instrument; whether, for instance, such implied notice, although extending to unusual covenants on the sale of the term, would also extend to a clause of pre-emption contained in a lease, upon the sale of the reversion (*r*).

It is conceived, that upon the purchase of an estate in possession, those facts only are so far *material* as to render

Must produce deeds, and state all material facts; but need not point out defect in title;

nor matter of which purchaser has notice.

Whether it is universally true that notice of lease is notice of all its contents.

What facts are material to title within the above rule.

(*j*) Sug. 2.

(*k*) See *Lucas v. James*, 7 Ha. 410.

(*l*) 1 Jarm. C. by S. 63.

(*m*) Cooper, 312; and see *Gibson v. D'Este*, 2 Y. & C. C. C. 542; Sug. 6.

(*n*) Sug. 8.

(*o*) *Hall v. Smith*, 14 Ves. 426; *Pope v. Garland*, 4 Y. & C. 394; *Walter v. Maunde*, 1 Jac. & W. 181; *Smith v. Capron*, 7 Ha. 189.

(*p*) See the judgment in *Pope v. Garland*, 4 Y. & C. 401, 402, and cases cited.

(*q*) See Sug. 8.

(*r*) In *Martin v. Cotter*, 3 J. & L. 506, Sugden, C., intimates an opinion that the doctrine as to a lease being notice has been carried too far: and see *Nelthorpe v. Holgate*, 1 Coll. 203; and *Flight v. Barton*, 3 Myl. & K. 282.

Chapter III.

Not matters which increase a known risk ; *semble*.

Except on purchase of a reversionary interest.

Vendor's solicitor liable for misrepresentation.

Purchaser should inquire of party supposed to have a claim on the estate.

Supposed claimant bound by his statement or denial.

their disclosure obligatory upon the vendor, which affect his power to give to the purchaser that which he has contracted for ; and that, if he buy subject to a known risk, circumstances which increase the amount of risk need not, in general, be stated ; for instance, it has been held that the grantor of a personal annuity, or his agents, although bound to give honest answers to all relevant questions put by the intended grantee, need not voluntarily disclose the fact of his being already under large pecuniary liabilities (s) ; but where the consideration for the annuity is a *reversionary* interest belonging to the purchaser, the grantor is bound, in Equity, to communicate to the purchaser the unhealthy state of the proposed *cestui que vie* (t).

And the mere preparation of an annuity deed by the grantor's solicitor does not place him in any confidential relation towards the grantee, even although no other solicitor be employed in the transaction (u).

A solicitor, however, is liable, at law (v) and in Equity (w), who by his misrepresentation induces a person to purchase his client's estate with a defective title.

We may also, in connection with the above head, observe, that a purchaser suspecting that a third person has a claim on the estate, should (x), in the presence of witnesses (who may take notes of what passes) (y), inquire of him whether such be the fact, and the amount of his claim ; at the same time stating his own intention to purchase (z) : and if such person deny the existence of his claim, or assert that it is confined to a specified sum, he will, in Equity, be bound by his denial or assertion (a) :

(s) *Adamson v. Evitt*, 2 Russ. & M. 72.

(t) *Davies v. Cooper*, 5 Myl. & Cr. 270.

(u) *Adamson v. Evitt*, 2 Russ. & M. 72.

(v) Sug. 6, n. (f).

(w) *Arnot v. Biscoe*, 1 Ves. s. 96.

(x) Sug. 9 ; *Ibbottson v. Rhodes*, 2 Vern. 554.

(y) *Doe v. Perkins*, 3 Durn. & E. 749.

(z) 2 Vern. 554.

(a) *Pearson v. Morgan*, 2 Bro.

but, although bound to answer truly, if at all, he may, it would appear, decline to answer, unless the intended purchaser offer to redeem him (*b*).

So, if the interest contracted for be merely equitable, the purchaser should inquire of the trustees whether there are any and what incumbrances; and, on completion, should give them notice of the sale; this is advisable for the sake as well of avoiding litigation with future, as of discovering the existence of present incumbrancers; at the same time, when the purchase is of an equitable estate in land, it appears to be settled that no priority is obtained by inquiry and notice (*c*).

Purchaser should inquire of Trustees on purchase of equitable estate, and give notice. But notice does not give priority in case of real estate.

The trustees will be liable in Equity if they give false information, either fraudulently or merely through forgetfulness (*d*).

Trustee giving false information is liable.

(2.) *As to commendatory and other similar statements by a vendor.*

As to commendatory statements by vendor.

It may be laid down as a general rule, that mere expressions of praise or affirmations of value, such as, that an estate, sold as a renewable leasehold, is "nearly equal to freehold (*e*);" or that land, in fact imperfectly watered, is "uncommonly rich water meadow land (*f*);" that a house of mean character, is "a desirable residence for a family of distinction (*g*);" will not, however objectionable they may be in point of morality, avoid the contract in Equity.

Vendor not prejudiced by mere puffing statements.

And the rule, perhaps, extends to any statement by a vendor, which is, in effect, a mere expression of his own opinion, and does not amount to an assertion of an inde-

If amounting to mere expression of opinion, and not to statement of facts.

C. C. 388; and see 6 Ves. 183, and 470.
3 Ves. & B. 111.

(*e*) *Fenton v. Broune*, 14 Ves. 144.

(*b*) See 2 Y. & C. C. C. 390, *Bugden v. Bignold*.

(*f*) *Scott v. Hanson*, 1 Sim. 13.

(*g*) *Magennis v. Fallon*, 2 Moll.

(*c*) *Vide infra*.

587.

(*d*) *Burrowes v. Lock*, 10 Ves.

Chapter III.

pendent and ascertainable fact: such as, a statement, on the sale of an advowson, that an avoidance is "likely to occur soon (*h*) ;" or, on the sale of renewable leaseholds, that the fine payable is "small (*i*) ;" if a purchaser choose to rely on the vendor's opinion as to what is a small fine, or a probability of speedy avoidance, he does so at his peril.

What misrepresentation will at law avoid the contract, or sustain an action.

And in the strong case of the vendor of an annuity stating that the grantor, (then in prison for debt and insolvent,) "was a man of large property," he was held not liable to an action of deceit at Law (*j*).

Mis-statement that a life is a healthy one, not qualified by guarantee that it is insurable at specified rate.

Where, however, on the sale of a life interest, the particulars described the tenant for life as a very healthy gentleman aged forty-eight, whose life was insurable, and an insurance was guaranteed at five guineas *per cent.*, and it turned out that the vendors had recently insured the life at a rate less than five guineas *per cent.*, but exceeding the rate usually charged on healthy lives, their bill was dismissed with costs, although the purchaser admitted that he knew five guineas to be more than the usual premium (*k*).

Valuation of estate by surveyor.

And a false statement, by a vendor, of an independent fact,—as, that the property has been valued by a surveyor at a specified sum,—will, if relied on by the purchaser (*l*), avoid the contract at law and in equity (*m*) ; and might, perhaps, sustain an action at Law: but a vendor is not liable to such action for the false assertion that a third person has offered a specified sum for the estate (*n*).

Offer for purchase of estate by third person.

Difference between the two last cases.

There would seem to be a clear ground of distinction between the two last cases ; for a purchaser might naturally consider the opinion of a surveyor to indicate something

(*h*) *Trower v. Newcome*, 3 Mer. Beav. 146.
704.

(*m*) *Buxton v. Lister*, 3 Atk. 386 ;

(*i*) *Fenton v. Browne*, 14 Ves. 144. *Small v. Attwood*, 1 You. 407 ; Sug.

(*j*) *Dawes v. King*, 1 Stark. 75. 4 ; *Lord Brooke v. Rounthwaite*, 5

(*k*) *Brealey v. Collins*, You. 317. Hare, 298.

(*l*) See *Clapham v. Shillito*, 7 (*n*) Sug. 3.

like the market value of the property, although he might attach little importance to the bare offer by an individual, possibly made hastily and soon repented of: though certainly, in the reported case, the purchaser seems to have been directly influenced by the mis-statement.

And a false statement that a specified rent is paid for the premises (*o*), has been held to subject the vendor to an action at law, although the purchaser did not rely on his statement, but made inquiries of other persons; who, it is presumed, also deceived him.

Purchaser when liable although statement not relied on.

And the same liability is incurred by a stranger, who, even from mere wantonness, intending to deceive, although without any view to gain, makes a false representation to a purchaser as to the value or rent of the property; nor is it material that the sale is by auction instead of private contract (*p*); Sir *E. Sugden* says (*q*), citing Sir *W. Grant*, "In cases of this nature it will be sufficient to show, 1st, that the fact as represented is false; 2ndly, that the person making the representation had a knowledge of a fact contrary to it (*r*)."¹ The rule is otherwise laid down by *Mansfield*, C. J., who says, that "it signifies nothing whether a man represents a thing to be different from what he knows it to be, or whether he makes a representation which he does not know at the time to be true or false, if in point of fact it turns out to be false (*s*)": the better opinion, however, seems to be, that, in order to sustain an action at Law, there must be *actual fraud*; that is, either an assertion, (with or without motive,) of what the party knows to be untrue (*t*), or a communication,

Stranger when liable for mis-statement.

There must be actual fraud; *semble*.

(*o*) *Lysney v. Selby*, Ld. Raymond, 506; and see 1 Bro. C. C. 546; 3 1118.

(*p*) *Bardell v. Spinks*, 2 Car. & 2 Bro. C. C. 388.

(*q*) Sug. 5.

(*t*) See Lord Campbell's judgment in *Wilde v. Gibson*, 1 H. L. C. 633;

(*r*) *Burrowes v. Lock*, 10 Ves. 476.

and cases cited *infra*, n. (*u*).

(*s*) *Schneider v. Heath*, 3 Camp.

Chapter III. for a deceitful and fraudulent purpose, of that which is in fact untrue, although he may not know it to be so (*u*).

Guarantee of solvency must be in writing.

A representation that a man is able to answer an obligation is not binding unless in writing (*v*).

As to concealment and disclosure of advantages by purchaser.

Purchaser need not disclose concealed advantages.

But cannot sue in equity if he mislead the vendor.

And must disclose fact increasing vendor's interest in the property.

(3.) *As to concealment and disclosure of advantages by the purchaser.*

A purchaser need not disclose any fact, unknown to the vendor, which increases the value of the property itself; *e.g.* the existence of a mine (*w*).

But anything, even a mere word, which tends to mislead the vendor upon such a point, will deprive the purchaser of the assistance of a Court of Equity (*x*).

And a purchaser is bound, in Equity, to disclose any fact, unknown to the vendor, which increases his *interest* in the property; *e.g.* the actual (*y*) or imminent (*z*) death of a prior life tenant.

As to depreciatory remarks, &c., by purchaser.

Purchaser depreciating the property to intended buyer cannot sue in equity.

Whether liable to an

(4.) *As to depreciatory remarks, &c., by the purchaser.*

A purchaser who has misrepresented the property to a third person desirous of purchasing it, cannot enforce the contract in Equity (*a*).

A purchaser, however, is not liable to an action at Law for having depreciated the value of the property, or the vendor's chance of sale (*b*): nor will an action lie against a

(*u*) See *Foster v. Charles*, 6 Bing. 396; *Polhill v. Walter*, 3 B. & Ad. 114; *Shrewsbury v. Blount*, 2 Man. & Gr. 475; *Freeman v. Cooke*, 6 Dow. & L. 187; *Taylor v. Ashton*, 11 Mee. & W. 401.

(*v*) 9 Geo. IV. c. 14, s. 6: see *Haslock v. Fergusson*, 7 Ad. & El. 86.

(*w*) 2 Bro. C.C. 420; Jac. 178.

(*x*) Jac. 178.

(*y*) *Turner v. Harvey*, Jac. 169; and see *Davies v. Cooper*, 5 Myl. & C. 270.

(*z*) *Ellard v. Lord Llandaff*, 1 Ball & B. 241.

(*a*) *Howard v. Hopkyns*, 2 Atk. 371.

(*b*) *Vernon v. Keys*, 12 East, 632; see p. 638.

stranger for preventing a sale by giving notice of his claim upon the estate, unless it be shown that such notice was given maliciously (*c*): and, in any case, in order to support an action for slander of title, the Plaintiff must prove falsehood, malice, and special damage (*d*).

Chapter III.

action at law.

Slander of title by stranger.

It appears that an agreement between two persons, not to bid against each other at an auction, is not illegal; and forms a good consideration for an agreement giving to the party withdrawing his opposition at the auction a right of pre-emption over other property (*e*).

Agreement with, not to bid against at sale permissible.

It may be remarked that, when a written agreement between the parties has once been entered into, all previous representations become immaterial, except for the purpose of defence in Equity (*f*), or of rebutting a defence, and so maintaining the written contract.

Effect of written agreement, on preliminary negotiations.

(*c*) See Sug. 423, and cases cited.

(*e*) *Galton v. Emuss*, 1 Coll. 243.

(*d*) *Brook v. Rowl*, 19 L. J. 114,

(*f*) *Haynes v. Hare*, 1 H. Bl. 664.

Chapter IV.

CHAPTER IV.

AS TO THE PARTICULARS AND CONDITIONS OF SALE.

1. *General matters relating to particulars and conditions, and their construction.*
2. *Preparation and contents of particulars.*
3. *As to the conditions.*
4. *As to what special conditions are generally requisite in various specified cases.*
5. *General remarks on special conditions.*

Doubtful
particulars
and condi-
tions con-
strued
strictly
against
vendor.

(1.) PARTICULARS and conditions of sale, if intended to exclude the purchaser from what he would otherwise be entitled to, must be expressed in terms the most clear and unambiguous (*a*) ; if there be any chance of reasonable doubt or misapprehension as to their meaning, the construction will be in his favour (*b*).

But not so
as to con-
travene rule
of law or
universal
custom.

It seems, however, that general expressions may not be so read by a purchaser as to make them contravene a well known rule of law, or universal custom, if they be capable of bearing a modified meaning; as where the particulars stated that the fines of a manor about to be sold were arbitrary, it was, in the opinions of Lords *Campbell* and *Brougham*, no misdescription, when it was shown that, (the fines on alienation being arbitrary,) those on the

(*a*) *Symons v. James*, 1 Y. & C. C. C. 562; *Smith v. Ellis*, 14 Jur. C. C. 490. 682.

(*b*) S. C.; *Seaton v. Mapp*, 2 Coll.

admission of a widow to freebench were certain; inasmuch as such latter fines *never are* arbitrary (c). Chapter IV.

And even when the conditions are such as would not, under ordinary circumstances, be enforced in Equity, a purchaser may be bound if his attention be drawn to their objectionable nature before he buys; as where, upon a sale under catching conditions as to title, he inquired, "whether a good and marketable title could be made?" and the auctioneer and vendor's solicitor refused to insert any such statement in the conditions, but said that a good title could be made *under the existing conditions*, the purchaser was held to his bargain (d). And may bind purchaser whose attention is directed to their objectionable character.

Any undertaking on the part of the vendor will, it is conceived, as a general rule, be construed strictly in favour of the purchaser; in fact, in a recent case, where, in an agreement for a twenty-one years' lease of a house in Highbury Place, it was stipulated, that there should be a "covenant by lessor for quiet enjoyment by the tenant, and not to let any of the land near Highbury Place, for the purpose of making and burning bricks," it was held, by V. C. *Wigram*, that the lessor must show his title to bind the adjoining land by such a covenant during the proposed term; although it appeared, on the face of the agreement, that the lease was to be granted under a power contained in a Will (e): but this decision was reversed by Lord *Cottenham* (f). Vendor's undertakings strictly construed.

As a general rule, the particulars and conditions cannot be contradicted, explained, or added to, by any verbal declarations at the time of sale (g); evidence of such declarations is inadmissible at Law on behalf of either Cannot be contradicted, explained, or added to, by verbal declarations.

(c) *White v. Cuddon*, 8 Cl. & F. see pp. 786 and 796.

(f) *S. C.* 12 Jur. 709.

(d) *Hyde v. Dallaway*, 6 Jur. 119; 4 Beav. 606.

(g) 1 Jac. & W. 639; Sug. 22;

Higginson v. Clowes, 15 Ves. 521; and see *Manser v. Back*, 6 Ha. 443.

(e) *Daves v. Belts*, 12 Jur. 412.

Chapter IV.

Such declarations inadmissible at law, and (if tendered by plaintiff) in equity.

Rule the same between purchaser and sub-purchaser.

Verbal declarations at sale why prejudicial to purchaser.

Should be reduced into writing.

Particular information to purchaser, or declarations by auctioneer, may be defence in equity against specific performance.

Alteration of printed particulars and agree-

plaintiff or defendant (*h*); and in Equity on behalf of the plaintiff; even although the defendant (the purchaser) have agreed in writing to abide by the conditions and declarations at the sale (*i*).

And the same rules apply between the original purchaser at a sale, and his sub-purchaser (*j*).

When the auctioneer has, at the sale, made verbal declarations at variance with the particulars, &c., a purchaser would seem to be under this disadvantage, viz., that if the Court were clearly satisfied that he heard and understood the effect of the verbal declarations, he probably would not obtain a decree for specific performance *without* the variations, supposing them to be to his prejudice (*k*); nor, on the other hand, could he enforce specific performance *with* the variations, supposing them to be in his favour: a purchaser, buying under such circumstances, should have the requisite alterations made in the printed particulars or conditions before the agreement is signed by himself and the vendor: although, in cases where the vendor is selling under a power or trust, this might occasionally give rise to questions with the parties beneficially interested.

But any particular personal information given to the purchaser, as to incumbrances, or the title, or even declarations on such points by the auctioneer, may be given in evidence by vendor or purchaser as a defence against a suit for specific performance according to the particulars, &c.; but do not seem to be admissible on behalf of the plaintiff (*l*).

Where the alteration was made in the printed particulars, and the altered copies were first produced in the

(*h*) *Powell v. Edmunds*, 12 East, 6.

(*i*) *Higginson v. Clowes*, 15 Ves. 521.

(*j*) *Shellon v. Livius*, 2 Crompt. & J. 411.

(*k*) Sug. 23; *Ogilvie v. Foljambe*, 3 Mer. 53; *Woodward v. Miller*, 2 Coll. 279.

(*l*) 15 Ves. 23; 1 Ves. & B. 524.

auction-room on the morning of sale, and the auctioneer, having read and sold by an altered copy, inadvertently signed agreements indorsed on unaltered copies, it was held, that a purchaser could not enforce specific performance according to the particulars as originally published; although it did not appear that he had heard the auctioneer read the altered copy, or had any knowledge of the alteration (*m*).

Chapter IV.
ment signed
on unaltered
copy.

If the sale be stated to be made "without reserve," the employment of a bidder to protect the estate (*n*), or any private arrangement equivalent to a reserved bidding (*o*), will vitiate the sale even in Equity; at Law there seems to be an inclination to carry the doctrine still further; and where the intention is to reserve a bidding, it is prudent to notice it in the particulars or conditions (*p*).

Sale stated
to be without
reserve,
no bidding
allowable
on behalf
of vendor.

(2.) *As to the preparation and contents of the particulars.*

Particulars.

The particulars should fairly and accurately describe the estate; if, although grammatically correct, they are so obscure as to be likely to deceive an ordinary purchaser, the sale will be liable to be set aside (*q*).

Description
of property
in, to be
fair and
clear.

An agreement to sell land, is, in the absence of any restrictive expressions, an agreement to sell the whole of the vendor's interest therein (*r*); and such interest, if not described, will be inferred to be an estate in fee simple (*s*); and, unless the contrary be expressed, the interest offered for sale, (whether it be absolute or qualified,) will be pre-

Agreement
to sell land,
what it
includes.

All legal
incidents
are presumed
to ac-

(*m*) *Manser v. Back*, 6 Ha. 443.

(*n*) *Meadows v. Tanner*, 5 Madd.

34.

(*o*) *Robinson v. Wall*, 10 Beav.

61; 2 Ph. 372.

(*p*) See *Thornett v. Haines*, 15

Mees. & W. 371, 372.

(*q*) *Taylor v. Martindale*, 1 Y.

& C. C. C. 658; *Symons v. James*,

ib. 490; *Martin v. Cotter*, 3 J. & Lat.
496.

(*r*) *Bower v. Cooper*, 2 Ha. 408.

(*s*) Sug. 339; *Hughes v. Parker*,

8 Mees. & W. 244; and see, *Cattel*
v. Corral, 4 Y. & C. 228, 236.

Chapter IV.

company
the pro-
perty.

sumed to be accompanied by all those advantages which are legally incidental to it. Therefore, an infringement of the rule, *Cujus est solum ejus est usque ad cælum*, is, (if not mentioned in the particulars,) sufficient to avoid the contract as against the purchaser (*t*).

Minerals,
unless nam-
ed, not in-
cluded in
sale to Rail-
way or
Waterworks
Company.

But an agreement to sell land to a Railway (*u*) or Waterworks Company (*v*), if subject to the provisions of the late Consolidation Acts, does not include the minerals, unless they are expressly comprised in the purchase.

Particulars
or condi-
tions must
notice per-
manent
charges, or
rights re-
strictive of
absolute
enjoyment
of property.

So, any charge upon the estate, or right restrictive of the purchaser's absolute enjoyment of it, and the release of which cannot be procured by the vendors, should be stated; or the omission may, in many cases, avoid the sale as against the purchaser (*w*); *e.g.*, a right of sporting over the estate (*x*), a right of common every third year (*y*), a right to dig for mines (*z*), a liability to repair the church chancel (*a*), or, (it is conceived,) a liability to heriots, or any other right or liability which cannot fairly admit of compensation, would, if undisclosed, have that effect.

Rights of
way.

Rights of way (if any) should be referred to; for although a mere non-disclosure of their existence, might not, in general, avoid the contract (*b*), the Court would readily lay hold of anything in the particulars, &c., at all inconsistent with their existence, as a ground for relieving a purchaser.

And any-
thing which
may deter-
mine vend-
or's interest.

So, if the vendor's interest be in any way determinable, the fact should appear; for when a redeemable annuity was offered for sale, simply as an annuity (*c*), and leasehold houses were sold, without any mention being made of a

(*t*) *Pope v. Garland*, 4 Y. & C. Ad. Ca. 50.

403.

(*z*) *Seaman v. Tawdrey*, 16 Ves.

(*u*) 8 Vict. c. 20, s. 77.

390.

(*v*) 10 Vict. c. 17, s. 18.

(*a*) *Forteblow v. Shirley*, 2 Sw.

(*w*) Sug. 352, 353.

223.

(*x*) *Burnell v. Brown*, 1 Jac. &

(*b*) *Oldfield or Bowles v. Round*,

W. 172.

5 Ves. 508.

(*y*) *Gibson v. Spurrier*, Peake's

(*c*) *Coverley v. Burrell*, Sug. 29.

private Act of Parliament which gave a Company the right to purchase them (*d*), the sales were held invalid. Chapter IV.

The vendor, however, is not bound to mention in the particulars any matter affecting the property, and of which the purchaser has notice: *e. g.*, on the sale of leaseholds, the fact that the covenants and restrictions in the lease are unusually stringent, need not be stated: for the purchaser, having notice of the lease, should satisfy himself as to the contents before he buys (*e*).

But not matter of which purchaser has notice; *e. g.*, stringent covenants on sale of leaseholds.

So, on the sale of copyholds, the particulars need not refer to the fines or customs of the manor; these being generally incidental to copyhold tenure (*f*).

Or fines or customs on sale of copyholds.

So, where, on the sale of freeholds, it distinctly appears by the particulars that the land is held of a manor, it is conceived, that the vendor need not refer to the existence of quit rents, or even heriots (*g*); the fair and proper course, however, would be to mention the fact: so, where land is sold as Fen land, the particulars need not refer to Embanking and Drainage Taxes, to which it is subject under a local but public Act of Parliament (*h*).

Or quit rents, &c., on sale of manorial freehold.

Or statutory local taxes.

So, on the sale of lands within the mining districts, any reference to the rights of mining (*i*), under the local customs, would, it is conceived, be unnecessary; as their existence is matter of notoriety.

Or notorious local customs.

But the particulars must contain no misrepresentation; *e. g.*, if, on the sale of leaseholds, the terms of the lease are misstated, the sale may be set aside; even although the auctioneer read the lease at the sale (*j*).

But there must be no misrepresentation; *e. g.*, misstatement of terms of lease, although read at sale.

(*d*) *Ballard v. Way*, 1 Mee. & W. 520.

(*e*) *Hall v. Smith*, 14 Ves. 426; *Pope v. Garland*, 4 Y. & C. 394; *Paterson v. Long*, 6 Beav. 590.

(*f*) See and consider, *White v. Cuddon*, 8 Cl. & Fin. 766.

(*g*) See *Damerell v. Protheroe*, 10

Q. B. 20; showing that heriots may be due in respect of freeholds.

(*h*) *Barraud v. Archer*, 2 Sim. 433; affirmed, 2 Russ. & Myl. 751.

(*i*) As to which see *Rogers v. Brenton*, 12 Jur. 263.

(*j*) *Flight v. Booth*, 1 Bing. N. C.

379; *Jones v. Edney*, 3 Camp. 285,

Chapter IV.

Or of dimensions of property, although in occupation of purchaser.

Nor anything calculated to deceive, or lull suspicion.

Reference to deceptive plan.

So, where property thirty-three feet in depth was described as forty-six feet deep, the purchaser was allowed an abatement, although he was the occupying tenant (*k*).

And the effect of what would otherwise be notice may be destroyed, not only by actual misdescription or misstatement, but by anything calculated to deceive, or even lull suspicion, upon the particular point; as where lot A. (building land), was expressed to be sold subject to the rights of way reserved by the existing leases of adjoining property B., and a plan, specially referred to in the particulars, disclosed a carriage-way reserved over A. to B., and also a way reserved over A. to another lot C., but gave no indication of *another* way reserved over A. to B., the particulars and plan were treated as deceptive, and the purchaser was not held bound, under the particular circumstances, to have inspected the leases (*l*).

Or deceptive statement as to liability under covenants in lease.

So, where a lessee sold, (by way of underlease,) part of a demised estate, and the particulars mentioned that the original lease contained a power of re-entry on breach of a covenant against certain trades being carried on upon the premises, and that the purchasers must enter into similar covenants, but did not state the fact that some underleases, already granted of parts of the property, contained no such covenants, the purchaser recovered his deposit at Law (*m*).

On sale of lease, removal of buildings which lessee must deliver up at end of term, must be stated.

Where a lease, which contains the usual covenant to deliver up the premises in good repair at the end of the term, is sold, and any of the demised buildings have been removed, the fact should be stated: the omission of the buildings from the particulars is not sufficient (*n*).

and see *Van v. Corpe*, 3 Myl. & K. 269; *Flight v. Barton*, *ib.* 282.

(*k*) *King v. Wilson*, 6 Beav. 124.

(*l*) *Dykes v. Blake*, 4 Bing. N. C. 463; and see *Gibson v. D'Este*, 2 Y. & C. C. C. 542.

(*m*) *Waring v. Hoggart*, Ry. & Moo. 39; and see *Dawes v. Betts*, 12 Jur. 412, 709.

(*n*) *Granger v. Worms*, 4 Camp. 83.

As respects commendatory statements and descriptions in the particulars, we may refer to the observations already made in Ch. III.: a fair and correct description will, in the average, be found to be as agreeable with sound policy as it is with morality.

When a plan of the estate is attached to, or accompanies, the particulars, and is incorrect, it will be a material consideration with a Court of Equity whether the purchaser was thereby misled: but, if accurate, it is merely tantamount to a view of the property; so that when an estate was sold in lots, and it correctly appeared by the plan that lot 1, an Inn, was supplied with water by a drain leading from a well in lot 4, this was held not to amount to any engagement on the part of the vendor that there should be any reservation of a right to water in the conveyance of lot 4: and a bill filed by the purchaser of lot 1 for compensation, was dismissed with costs (*o*).

So, on the sale or lease of building-ground, the exhibition, on the plan, of intended improvements on the adjacent land, does not bind the vendor or lessor to execute such improvements (*p*): although it appears that a vendor would not be allowed to divide and appropriate the land in a different manner, so as to attract an occupancy and population entirely different from that which would probably have been produced by acting on the plan proposed and held out at the sale (*q*): nor, on the other hand, when a house is sold "with all its lights," does a statement in the particulars that adjoining land is building-land, authorize the vendor, or a purchaser of the adjoining land, to build thereupon, so as to obstruct such lights (*r*).

Chapter IV.

As to puffing statements in particulars.

Reference to erroneous plan.

To an accurate plan, is merely tantamount to view of estate.

To plan shewing intended adjacent improvements.

Effect of statement that adjoining land is building-land.

(*o*) *Fewster v. Turner*, 6 Jur. 144; and see *Dykes v. Blake*, 4 Bing. N. C. 463. (*q*) *Peacock v. Penson*, 11 Beav. 355.

(*p*) *Feoffees of Heriot's Hospital v. Gibson*, 2 Dow, 301; *Squire v. Campbell*, 1 Myl. & Cr. 459; see (*r*) *Swansborough v. Coventry*, 9 Bing. 305.

Chapter IV.

Vendor of house retaining adjoining land cannot obstruct lights.

And it may be here remarked, that it is well established that where the same person possesses a house, having the actual use and enjoyment of certain lights, and also possesses the adjoining land, and sells the house to another person, although the lights be *new*, he cannot, nor can any one who claims under him, build upon the adjoining land so as to obstruct or interrupt the enjoyment of those lights (*s*).

Meaning of particular expressions.

In the construction of particulars of sale, the Courts have attached the following meanings to the following expressions ; viz.,

“Brick-built house;”

By the description of a house as “brick-built,” is understood brick-built in the ordinary sense of the word ; not composed externally partly of brick, and partly of timber and lath and plaster (*t*) :

“Clear yearly rent;”

By “clear yearly rent,” is understood a rent clear of all outgoings, &c. usually borne by the tenant ; but subject to such (as land tax) as are borne by the landlord (*u*) :

“Farm;”

The expression “farm,” includes woodland, part of the estate, although not in the occupation of the Tenant (*v*) ;

“Free public house;”

The expression “free public house,” is a misdescription when the lease contains a covenant to take beer from the lessor (*w*) :

“Ground rent;”

By the expression “ground rent,” if unexplained, is to be understood a rent less than the rack rent of the premises : its proper meaning is the rent at which land is let for the purpose of improvement by building (*x*).

(*s*) *Per Curiam*, 9 Bing. 309.

(*t*) *Powell v. Double*, Sug. 30.

(*u*) 2 Ves. sen. 500.

(*v*) *Portman v. Mill*, 3 Jur. 356.

(*w*) *Jones v. Edney*, 3 Camp. 285.

(*x*) *Stewart v. Alliston*, 1 Mer. 26.

Chapter IV.

(3.) *As to the conditions.*

Conditions.

In the absence of stipulation, a bidder at an auction may, audibly, before the fall of the hammer, retract his bidding (*y*) ; a condition negating this right is almost always inserted, and is recommended by Sir *E. Sugden*, who nevertheless expresses his opinion that it cannot be enforced (*z*) : such a condition, however, was recently held to bind a mortgagee's solicitor, who bid at a sale of the mortgaged property made by the Court with the mortgagee's concurrence (*a*).

Against retracting biddings.

Whether or no binding.

On sales by auction, a reserved bidding, if desired, should be provided for by the conditions : it does not, however, appear that the employment of a bidder merely to protect the estate from a sale at an undervalue, will, in Equity, avoid the sale, unless it be stated to be without reserve (*b*).

For reserved bidding, how far necessary.

On a sale by auction, it is usual to require, by the conditions, payment of a deposit by the purchasers ; and, in many cases, this may be a prudent precaution on a sale by private contract : if the deposit will amount to a large sum, it may be well to provide for its investment, (Exchequer Bills are usually selected,) in order that there may be no loss of interest, nor liability from the depreciation of securities.

As to payment and investment of deposit.

It is also the ordinary practice to insert a condition that the vendor shall, within a specified time, at his own expence, make and deliver to every purchaser an abstract of the title to the lot or lots purchased by him ; but the vendor is, independently of any condition, bound to deliver an abstract ; a delivery of the title deeds is not

For delivery of abstract.

(*y*) *Payne v. Case*, 3 Durn. & E. 148.

(*z*) Sug. 20.

(*a*) *Freer v. Rimmer*, 14 Sim. 391.

(*b*) Sug. 16 ; *Woodward v. Miller*, 2 Coll. 279 ; *vide infra*, Ch. V. and *supra*, p. 51.

Chapter IV. sufficient (c) : the condition, however, is useful as fixing the time for delivery.

Restrictive of purchaser's right to abstract, when expedient.

When the lots are small, and the title is voluminous, it may be well to provide, that no purchaser whose aggregate purchase-money shall not amount to a specified sum shall be entitled to an abstract, (or an abstract going beyond a certain date,) except at his own expence : in such a case it may be well to stipulate that a full abstract shall be deposited with the vendor's solicitor, or elsewhere, for inspection by purchasers.

"Abstract," in conditions as to time, means "perfect abstract."

If any other condition refer to "the delivery of the abstract," this, in any question as to time, will be held to mean the delivery of a *perfect* abstract (d) : *i. e.*, an abstract as perfect as the vendor could furnish at the time of delivery (e).

Effect of non-delivery of, on conditions as to time.

If the vendor fail to deliver a perfect abstract within the time specified, the purchaser is relieved from any condition binding him to object to the title within a given period from delivery of the abstract (f) : it is not unusual to guard against this rule, by providing, (in the condition as to objections,) that "an abstract shall, as regards any objection or requisition, be considered perfect, if it supply the information suggesting the same, although it may be otherwise defective" (g).

Condition for time of completion, and as to interest.

It is usual, and proper, in every case, to specify in the conditions the day on which the purchase is to be completed, and from which day the purchaser is to have possession of the estate, or (if it be in lease) receipt of the rents and profits, and to pay interest upon the purchase-money if not then paid ; and up to which day the vendor is to pay the outgoings. This condition, as to time, will

(c) Sug. 431 ; *Horne v. Wingfield*, 3 Scott, N. R. 340.

(d) *Hobson v. Bell*, 2 Beav. 17.

(e) *Morley v. Cook*, 2 Ha. 111.

(f) *Blacklow v. Laws*, 2 Ha. 40 ; *Southby v. Hutt*, 2 Myl. & Cr. 211.

(g) And see also *infra*, Ch. VIII.

not, however, in ordinary cases, be binding in Equity, unless time be declared to be of the essence of the contract (*h*). It is generally thought best to provide that the arrangement as to payment of interest and receipt of the profits, &c., shall hold, whatever may be the cause of delay in completion: and it was, until recently, the general opinion, that the purchaser must, under such a condition, pay interest during the time spent in clearing up the title (*i*): although, of course, it would not justify the vendor in wilful delay (*j*): but where the expression was, "if from any cause whatever the purchase-money shall not be paid on, &c., the purchaser *making default* shall pay interest," &c., it was decided, that the purchaser was exempted from payment of interest when the delay arose from the state of the title; inasmuch as he had made *no default* (*k*): in a modern case, at Law, where the agreement was that the purchaser should pay interest from the day fixed for completion, if completion "should be delayed on his part," and the vendor and his trustee were ready to complete on the day named, but the purchaser was not prepared, and afterwards, when the purchaser was ready, the vendor's trustee refused to concur, it was held that interest was not payable after the latter date (*l*): in a recent important case (*m*), where the purchase was to be completed and the money paid on a certain day, "but if the purchaser should fail in making such payment, then, from whatever cause the delay might have arisen," interest was to be paid at five *per cent.*; and considerable delay arose in making out the title, it was held, either that the purchaser

Chapter IV.

Should provide for payment of interest in all events.

Effect of the condition.

De Visne v. De Visne.

(*h*) *Vide infra*, Ch. X.

G. & S. 689; 12 Jur. 89.

(*i*) See *Greenwood v. Churchill*, 8 Beav. 413; *Esdaile v. Stephenson*, 1 Sim. & St. 122.

(*l*) *Perry v. Smith*, 1 Car. & M. 554.

(*j*) *S. C.*; see the judgment in *De Visne v. De Visne*, 1 Mac. & G. 336.

(*m*) *De Visne v. De Visne*, 1 Mac. & G. 336; *vide infra*, Ch. XIII. as to payment of interest.

(*k*) *Denning v. Henderson*, 1 De

Chapter IV. was not bound to pay interest until a good title was shown, or that, if bound by the condition to such payment, he was entitled to an equivalent compensation from the vendor: probably a condition that "if from any cause whatever, other than the wilful and capricious refusal of the vendor to make out his title or to convey the estate, the purchase shall not be completed on the specified day, the purchaser shall thenceforth pay interest on so much of his purchase-money as for the time being shall remain unpaid, and shall have no claim to compensation in respect of the delay in completion," might escape the rule laid down in *De Visme v. De Visme*.

Condition
for payment
of rent in
lieu of inter-
est, not
usurious.

We may here remark that an agreement that if the purchase-money is not paid at the time fixed for completion the purchaser shall pay "in lieu of interest upon the same a clear rent of *l. per annum*," is not usurious by reason of the rent exceeding the amount of interest at *5l. per cent.* on the purchase-money (*n*).

For prepa-
ration and
execution of
conveyance.

It is usual upon a sale by auction, to provide, that the vendor shall, upon payment of the purchase-money, execute proper conveyances to the respective purchasers, of the lots purchased by them respectively; such conveyances, &c., to be prepared by and at the expence of the respective purchasers, and by them tendered for execution at a specified time and place: the condition is scarcely necessary; for the contract in itself gives the purchaser a right to a conveyance upon payment of his purchase-money; and he is, *primâ facie*, bound at his own expence to prepare and tender it (*o*).

For appor-
tionment of
rent, on sale
of reversion.

If, where property is sold in lots, any part comprised in two or more lots be upon lease at one entire rent, or if all or any part of the property comprised in one lot, be let together with other property at one entire rent, the con-

(*n*) *Spurrier v. Mayoss*, 1 Ves. jun. 527.

(*o*) *Sug.* 263; *Poole v. Hill*, 6 Mee. & W. 835.

ditions must provide for its apportionment ; and, although not strictly necessary, it may, by way of preecautiōn, be well to provide, that the concurrence of the tenant shall not be required (*p*).

Upon the sale of land used for agricultural purposes, it may be often necessary to insert a condition as to the growing crops being taken and paid for by the purchaser.

As to crops,
&c.

If the property be in lease at the time of sale, the purchaser will, of course, be subject, in this respect, to the rights of the tenants : if, however, it be in hand, and nothing be said as to the crops, they will belong to him from the day fixed for completion : and it is conceived that the vendor will not be at liberty previously to remove them in an immature state.

Right to,
if no condi-
tion.

There should be a condition as to fixtures, if the purchaser is to pay for any ; common fixtures would probably be held to be included in a contract for sale, and would pass by the conveyance, unless a contrary intention could be collected from the instrument (*q*).

As to
fixtures.

Payment for timber by the purchaser, if intended, must be provided for by the conditions (*r*).

As to
payment for
timber.

The expression "timber," includes oak, elm, and ash, everywhere ; and, by local custom, beech (*s*) and various other trees ; even trees which are primarily fruit trees, as cherry, chestnut, and walnut (*t*) ; no wood, however, is timber until of twenty years' growth (*u*) : as a general rule, pollards would seem not to be timber ; if sound they may, however, be timber by local custom : and the expression "timber and timber-like trees," would seem, to include sound pollards (*v*) : an exception, in a lease, of "all timber

What is
"timber."

(*p*) 3 Dav. Conv. 73.

(*q*) Sug. 37, and cases cited.

(*r*) Sug. 36 ; see *Higginson v.*

Cloues, 15 Ves. 516.

(*s*) *Aubrey v. Fisher*, 10 East,

446.

(*t*) *Duke of Chandos v. Talbot*, 2

P. Wms. 606.

(*u*) *Foster v. Leonard*, Cro. Eliz. 1.

(*v*) *Rabbett v. Raikes*, Woodfall's

Landl. and Ten. 457 ; and see 2 P.

Wms. 606.

Chapter IV.

and other trees, but not the annual fruit thereof," would seem not to include garden or orchard fruit trees, unless by local custom (*w*); the term "fruit" being considered to refer to the mast of timber trees.

As to mis-
description
and com-
pensation.

It is generally provided, upon a sale by auction, and often upon a sale by private contract, that any misdescription, mistake, or error in the particulars, either way, shall not avoid the sale, but shall be the subject of compensation.

Does not
extend to
misdescrip-
tion, if
wilful;

Notwithstanding this condition, the mis-statement, if wilful or designed, amounts to fraud, and, even at Law, avoids the contract as against the purchaser: if it arise simply from negligence, Equity will, notwithstanding the condition, refuse a specific performance at the suit of the vendor, if the error be not a fair subject for compensation (*x*): at Law, cases have occurred, in which the opinion was entertained that, however gross the negligence, the purchaser is bound, if there be no fraud (*y*); but this opinion has not been followed (*z*): and the rule at Law seems now to be as laid down by *Tindal*, C. J.; viz., "that where the misdescription, although not proceeding from fraud, is, in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such a case the contract is avoided altogether, and he is not bound to resort to the clause of compensation: under such a state of things he may be considered as not having purchased the thing which was really the subject of the sale" (*a*).

or affecting
the substan-
tial subject-
matter of
the contract;

or caused
by gross
negligence.

And where a vendor, who has the means of knowledge,

(*w*) *Bullen v. Denning*, 5 B. & C. Car. & P. 728.
842.

(*z*) Sug. 36.

(*x*) Sug. 30.

(*a*) *Flight v. Booth*, 1 Bing. N. C.

(*y*) *Wright v. Wilson*, 1 Moo. & 370, 377.

R. 207; and see *Mills v. Oddy*, 6

and is bound to use due diligence, misdescribes his property upon any important point, it seems probable that the facts would in themselves be deemed conclusive as to fraud (*b*): *e.g.*, a statement in particulars that the estate was about one mile from Horsham, when in fact it was upwards of three miles distant (*c*); and, in another case, a material mis-statement, upon the sale of a house, as to the amount of the ground rent (*d*), and, in a later case, a description of dilapidated property, as “good and substantial but unfinished buildings (*e*),” seem to have been considered, at Law, to be, from their very nature, fraudulent.

If, however, the intended purchaser do not rely upon the particulars or statements of the vendor, but examine the property in person or by his agents, he cannot, in the absence of direct fraud, contend that he is deceived by the representations of the vendor as to any point upon which he has thus tested their accuracy (*f*).

But purchaser testing accuracy of particulars may be bound.

And it may be collected from the cases at Law and in Equity, that, independently of fraud, and on the mere ground of the materiality of the misdescription, the usual condition as to compensation will not avail in the following cases, viz:—

Cases where materiality of misdescription will avoid common condition.

1st. Where the property is not of the same description as it appears to be in the particulars; as where long leasehold is described as freehold (*g*); or as where, upon the sale of an estate let at lease on a rack rent, such rent is described as a ground rent (*h*); or as where a house, com-

Where property is of different nature;

(*b*) See Sug. 36.

(*c*) *Duke of Norfolk v. Worthy*, 1 Camp. C. 337.

(*d*) *Mills v. Oddy*, 6 Car. & P. 728.

(*e*) *Robinson v. Musgrove*, 8 Car. & P. 469; but, in general, a mis-statement as to the state of repairs would seem to be a matter for com-

pensation in equity: *Dyer v. Hargrave*, 10 Ves. 505, 508.

(*f*) See *Attwood v. Small*, 6 Cl. & Fin. 232; see the judgment in *Clapham v. Shillito*, 7 Beav. 149.

(*g*) See and consider *Browne v. Fenton*, 14 Ves. 144.

(*h*) *Stewart v. Alliston*, 1 Mer. 26.

Chapter IV.

posed externally partly of brick and partly of timber and lath and plaster, is described as a brick-built house (*i*).

or not identical;

2ndly. Where the property, as described, is not identical with that intended to be sold: as when a vendor, intending to sell No. 2 in a street, described it as No. 4, the purchaser, although No. 2 was the same description of house as, and in better repair than, No. 4, recovered his deposit at Law (*j*).

or material part of it is wanting, or has no title;

3rdly. Where a material part of the property described has no existence, or cannot be found (*k*); or where no title can be shown to it; as when, upon the sale of a leasehold house and small yard adjoining, the yard was not included in the lease, but held from year to year at a separate rent (*l*).

or its due enjoyment is materially affected;

4thly. Where the misdescription is upon a point material to the due enjoyment of the property; as when, upon the sale of a lease of a house and shop, the particulars merely stated that the lease contained a restriction against certain specified trades being carried on upon the premises, whereas in fact several *other* trades were forbidden (*m*): so also, where, upon the sale of a piece of land described as "a first-rate building plot of ground," no notice was taken of a right of way passing over it (*n*), or of an underground watercourse which third parties had liberty to open, cleanse, and repair, making satisfaction for damage thereby occasioned (*o*).

or amount of compensation cannot be estimated;

5thly. Where the misdescription is of such a nature that the amount of compensation cannot be estimated; as where, on the sale of a reversion, expectant on the decease

(*i*) *Powell v. Double*, Sug. 30.

(*m*) *Flight v. Booth*, 1 Bing. N. C.

(*j*) *Leach v. Mullett*, 3 Car. & P.

370.

115.

(*n*) *Dykes v. Blake*, 4 Bing. N. C.

(*k*) *Robinson v. Musgrove*, 2 Moo.

463; and see *Gibson v. D'Este*, 2 Y. & C. C. C. 542.

& R. 92.

(*l*) *Dobell v. Hutchinson*, 3 Ad. &

(*o*) *Shackleton v. Sutcliffe*, 1 De G. & S. 609.

El. 355.

of A. in case he should have no children, his age was described as 66 instead of 64 (*p*); or as where, on the sale of a wood, the particulars erroneously stated that the *average size* of the timber approached 50 feet, the *number* of trees not being stated (*q*); or as where the particulars stated the premises to be in the joint occupation of A. and B. as *lessees*, when in fact A. was only assignee of the lease, and B. was a mere joint occupier (*r*).

And it may be observed, that where the vendors are trustees they are not justified in allowing compensation for their own errors, and a Court of equity will refuse to act upon the condition (*s*).

Whether trustees can use condition as to misdescriptions.

In the absence of stipulation, a vendor is bound to produce, at his own expense, the originals of all deeds and other instruments necessary to verify the abstract (*t*); except copies of Court Roll, and such instruments as are upon record (*u*), or have been lost (*v*) or destroyed; as respects all which he may verify his abstract by secondary evidence; he must, however, as a general rule, in order to render copies admissible in evidence, prove the execution, and delivery of the originals (*w*); which, when deeds are lost and the witnesses unknown, is often an insuperable difficulty: when the sale is completed, the purchaser is entitled to the original title deeds, or a covenant to produce them, and attested copies of the originals (*x*);

As to deeds; *primô facie* liability of vendor to produce, and deliver up on completion, or furnish attested copies.

(*p*) *Sherwood v. Robins*, Mood. & Malk. 194; and see 8 Cl. & Fin. 792.

(*q*) *Lord Brooke v. Rounthwaite*, 5 Ha. 298.

(*r*) *Ridgway v. Gray*, 1 Mac. & G. 109.

(*s*) *White v. Cuddon*, 8 Cl. & Fin. 766.

(*t*) Sugden, 449.

(*u*) *Cooper v. Emery*, 1 Phil. 388.

It seems doubtful whether the rule extends to deeds inrolled merely for

safe custody and not under any statutory provision; see 9 Jarm. Conv. by Sweet, 10.

(*v*) As to what is sufficient evidence of loss, see *Green v. Bailey*, 15 Sim. 542; *Fitzwalter Peerage*, 10 Cl. & Fin. 953; *Hart v. Hart*, 1 Ha. 1.

(*w*) *Bryant v. Busk*, 4 Russ. 1; see however as to this, *infra*, Ch. VIII.

(*x*) *Boughton v. Jewell*, 15 Ves. 176.

Chapter IV.

As to attested copies; solicitor's liability for omitting condition.

Course to be adopted upon sale of part of mortgaged estate.

As to ultimate custody of deeds, on sale in lots.

Restrictive of purchaser's rights to title and

this right, however, does not seem to extend to old deeds not necessary to make a title (*y*); or to copies of Court Roll, or instruments on record, unless, (as respects the covenant for production,) they are in the vendor's possession or power (*z*); or to documents used merely as negative evidence (*a*): the attested copies and deed of covenant must be prepared at the expense of the vendor (*b*): if he wish to negative the purchaser's rights in the above respects, he must do so clearly and explicitly in the conditions: and when property is sold in lots, it is the almost invariable practice to throw the expenses of attested copies upon the purchasers, and a solicitor would generally incur personal liability by omitting a condition to that effect: the condition, if so intended, should expressly provide for the expense of all attested copies, whether required for the verification of the abstract or for any other purpose; particular care to insert proper conditions as to deeds should be taken upon the sale of a part only of an estate in mortgage, when the purchase-money is not likely to pay off the incumbrance; a deposit of the deeds with some third party, for the joint benefit of the mortgagee and purchaser, will, if acquiesced in by the mortgagee be the most eligible arrangement (*c*).

On a sale in lots, it is generally requisite to provide for the ultimate custody of the deeds; the purchaser of the largest lot is usually made to take them and covenant for their production: where the intention is that they shall belong to the purchaser whose purchase-money amounts to the largest sum, it may occasionally be well to provide for the contingency of the two largest purchasers buying to an equal amount.

Every condition intended to relieve the vendor from his *primâ facie* liability to deduce a marketable title, and

(*y*) *Dare v. Tucker*, 6 Ves. 460.

1 Hayes on Conv. 573.

(*z*) *Vide infra*, 316.

(*b*) *Boughton v. Jewell*, 15 Ves. 176.

(*a*) See *Cooper v. Emery*, cited in

(*c*) Sug. 457.

verify the abstract by proper evidence at his own expense, must be expressed in plain and unambiguous language (*d*).

Chapter IV.

evidence, must be explicit.

For instance, a condition that he shall not be bound to produce any original deed or other document than those in his possession and set forth in the abstract, was held not to relieve him from his liability to verify the abstract; for *non constat* that because he has only certain specified deeds in his possession he cannot prove his title (*e*).

Against production of deeds. Vendor still bound to verify abstract *alibunde*.

So, on an agreement by a vendor to sell a lease "as he held the same" for twenty-eight years, a condition that the purchaser should not require the lessor's title, would not, it appears, prevent the latter from showing that the lease was invalid (*f*).

Against production of lessor's title; purchaser may prove lease void.

So, upon a sale of an underlease, described simply as a lease, a stipulation that the vendor should not be called upon to prove his title, was held to be worthless, when it appeared that the original lease comprised other premises, and contained covenants embracing both properties, and exposing the purchaser to eviction through the default of the holder of such other premises (*g*).

Or mere underlease, with joint liability of original covenants.

It may be doubted whether, in the absence of express stipulation, the common condition, as to recitals being evidence, would bind the purchaser to accept recitals as evidence of conclusions of Law (*h*).

As to recitals being evidence.

But a clear stipulation as to title is binding on a purchaser; *e. g.*, an agreement by Assignees of a bankrupt to sell his estate "under such title as he recently held the same, an abstract of which may be seen" (*i*); and a con-

Condition if explicit will bind purchaser.

(*d*) *Osborne v. Harvey*, 7 Jur. 229, V. C. K. B.; and see *Clarke v. Faux*, 3 Russ. 320.

(*e*) *Southby v. Hutt*, 2 Myl. & Cr. 207; and see *Dick v. Donald*, 1 Bli. N. S. 655.

(*f*) See Sug. 391; and see judgment in *Shepherd v. Keatley*, 1 Cro.

M. & R. 127, 128, disapproving of *Spratt v. Jeffery*, 5 Man. & R. 138; but see 2 Coll. 341.

(*g*) *Blake v. Phinn*, 3 C. B. 976; see *Fildes v. Hooker*, 3 Madd. 193.

(*h*) 9 Jarm. Conv. by S. 4.

(*i*) *Freem v. Wright*, 4 Madd. 364.

Chapter IV. dition that the purchaser should accept the vendor's title "without dispute" (*k*).

That abstract shall commence with specified document.

A condition, however, that the abstract shall commence with a specified document, merely precludes the purchaser from objecting to the title as commencing at too recent a period (*l*); so that, if the instrument in question do not form a good root of title, he may require the earlier title; so, a mere condition against production of the earlier title, would not preclude him from requiring the production of recited instruments which appear from their recitals to be of a suspicious character (*m*).

Does not preclude objections.

Nor will a mere condition against production, in any case prevent a purchaser from investigating and objecting to the earlier title, if he have the collateral means of doing so (*n*).

How to be framed when early title lost or defective.

If, therefore, the earlier title merely be wanting, the condition should provide for the abstract commencing with a specified document, (the nature and effect of which should be stated, if it be of such a kind as not to form a satisfactory root of title; *e. g.*, a recovery deed); and the purchaser should be precluded from requiring the production of the earlier title, or of any earlier documents which may be recited or noticed in the abstracted title: if the earlier title be defective, or if the recited missing instruments are of a suspicious character, the condition should be extended, so as to preclude him from requiring, investigating, or making any objection to the earlier title, or any document prior to the commencement of the abstract, although subsequently recited or referred to.

Production

And when a vendor, although not having a marketable,

- (*k*) *Duke v. Barnett*, 2 Coll. 337; 682.
 and see Sir Edward Sugden's remarks, V. and P. 395, 396, on *Cattell v. Corrall*, 3 Y. & C. 413; and see *Corrall v. Cattell*, 4 Mee. & W. 734; but see also *Smith v. Ellis*, 14 Jur. 682.
 (*l*) *Sellick v. Trevor*, 11 Mee. & W. 722.
 (*m*) *S. C.*
 (*n*) *Shepherd v. Keatley*, 1 Cro. M. & R. 117.

has still a safe holding title, it may be prudent, in using very special conditions, to state, that an abstract of the title may be inspected before the sale.

Chapter IV.
of abstract
before sale
sometimes
advisable.

It is often requisite to insert conditions providing for defects in evidence of the identity of the parcels; such conditions, however, will not relieve the vendor from the necessity of pointing out what the entire property is which he intends to convey; nor, (unless expressly framed to meet the case,) will they do more than provide for mere *deficiencies* in evidence; that is, they will not provide for *repugnancies*.

As to
identity of
parcels.

For instance, a condition that a certain plot of land could not be properly identified by the vendor, but it being fairly presumed that the purchaser, by inquiry in the neighbourhood, would be able to ascertain its true situation, he was to accept the plot by the description only contained in the conveyance deed of it, was held worthless, even at Law, when it appeared that the plot did not exist or could not be discovered (*o*).

When part
of property
cannot be
found;

So, a condition that no further evidence of identity of the parcels should be required than what was afforded by the deeds, instruments, and other documents abstracted, did not preclude a purchaser from requiring further evidence on the ground of the descriptions of the parcels in the abstracted documents varying from those in the particulars and from each other (*p*).

or descrip-
tions are
inconsis-
tent;

In the case of copyholds, the generality and vagueness of the descriptions on the Court Rolls are unimportant, if the vendor can show that the property has been actually held under such descriptions (*q*).

vague
descriptions
of copyholds
sufficient.

The Courts, it may be remarked, look with jealousy on conditions negating a purchaser's right to the usual

Stringent
conditions
not favoured
by Court.

(*o*) *Robinson v. Musgrove*, 2 Moo. 476.

& R. 92.

(*q*) *Long v. Collier*, 4 Russ. 267.

(*p*) *Flower v. Hartopp*, 6 Beav.

Chapter IV. and reasonable evidences of title ; they should not be used to a greater extent than is necessary, as their tendency is to damp the sale ; and this, not so much by diminishing the biddings of parties who actually attend, as by keeping away others who are alive to their objectionable character ; it cannot, however, be denied, that the prejudicial effect of even the most stringent conditions is practically far less than might be reasonably anticipated.

Abstract on sale in lots, should be verified at vendor's expense.

And it may be observed, that, on a sale in lots, the vendor should either verify the abstract at his own expense, or the expense of verification should be divided among the purchasers in some specified proportion ; otherwise the purchaser who first calls for evidence may be at the sole cost of procuring it.

As to expense of searches, &c.

“ There must be express conditions where the vendor intends to throw upon the purchaser the expense of such searches as are usually made by the vendor, of travelling to a distance to examine the abstract with the deeds, or the like” (*r*).

As to indemnity against charges, &c.

If the estate be subject to incumbrances which cannot be discharged, they must be mentioned in the particulars or conditions ; it often happens that property is subject to charges which, from particular circumstances, (such as there being other ample security,) are never likely to be enforced, although they cannot be immediately released ; in such cases it is advisable to state the facts as clearly and openly as possible, and stipulate that the purchaser shall make no objection in respect of the matters so mentioned ; if, as may often be the case, an indemnity be offered, its nature should be explicitly stated (*s*).

As to time for objections, &c.

It has become very usual to insert conditions restrictive of the time within which objections may be taken to the

(*r*) Sug. 38.

will be specifically enforced in equity ;

(*s*) See 3 Dav. Conv. 68. A condition to give a specified indemnity

Walker v. Barnes, 3 Madd. 247.

title; and enabling the vendor to annul the sale, if objections are taken which he is unable to remove; the latter condition, in fact, is inserted by many practitioners, as a matter of course, in all but the very plainest cases; and its insertion by a mortgagee, selling under a power with a title believed to be marketable but somewhat complicated, was approved of by a late very eminent conveyancer: if the condition be for rescinding the contract in case the title shall not prove "satisfactory" to the purchaser, this will not authorize him to make any other than the usual objections (*t*).

"Satisfactory" means "marketable" title.

This condition, however, cannot be relied upon by a vendor who knowingly enters into the contract with a clearly defective title to a portion of the estate: for instance, where a person, entitled in remainder subject to a life estate, contracted to sell the fee simple in possession, hoping that the tenant for life would concur, which she refused to do, the purchaser was allowed to take the reversion with a compensation, although there was a condition for rescinding the contract if a good title could not be made, which condition the vendor wished to enforce (*u*).

Not to be relied on by vendor knowingly selling with a defective title.

Nor will the condition enable a vendor to refuse to show a title, or, perhaps, in any case, to rescind the contract as against a purchaser who is at once willing to waive the objection or requisition and take the property without compensation (*v*): but it will enable a vendor, who has in fact a good title, to rescind the contract, upon an untenable objection being taken and persisted in (*w*).

Nor as against purchaser willing to complete without compensation:

but will hold good if untenable objection is persisted in.

(*t*) *Lord v. Stephens*, 1 Y. & C. Ex. 222.

4 Beav. 269; *Williams v. Edwards*, 2 Sim. 78.

(*u*) *Nelthorpe v. Holgate*, 1 Coll. 203; but see *Thomas v. Dering*, 1 Keen, 728.

(*w*) *Page v. Adam*, *ubi supra*.

(*v*) See and consider *Roberts v. Wyatt*, 2 Taunt. 268; *Page v. Adam*,

N.B.—In the third marginal placitum, it should be, "the objection being held invalid," instead of "the objection being held valid."

Chapter IV.

Extends to
requisitions.

Where a purchaser required that certain annuitants under a will should join in the conveyance, this was held to be an objection to the title within the meaning of such a condition (*x*): the condition should, however, in terms extend to requisitions.

Right to re-
scind, lost
by replying
to objec-
tions.

And, as a general rule, a vendor by replying to the purchaser's objections or requisitions, waives the right of rescinding the contract, and also the benefit of the condition limiting the purchaser's time for taking objections, &c. (that is, supposing them not to have been taken within such limited time) (*y*).

Unless
replies are
merely
argumenta-
tive or
returned
without
prejudice.

It seems, however, probable that mere argumentative replies would not amount to such a waiver: and that replies of any description, if returned "without prejudice," or with any similar reservation of the vendor's rights, would escape the rule laid down in *Tanner v. Smith* (*z*): or the rule may, it is conceived, be avoided, by the introduction, into the condition, of the words "notwithstanding any intermediate negotiations," or some equivalent expression.

Time runs
from de-
livery of
perfect ab-
stract;
meaning of
the term.

For the purposes of such conditions time runs from the delivery of a perfect abstract; that is, an abstract as perfect as the vendor, at the time of delivery, has in his either actual or constructive possession (*a*); but a vendor would not be at liberty designedly to deliver an imperfect abstract, or otherwise neglect his duties under the contract, for the purpose of rescinding the contract under such conditions (*b*).

Objections
arising upon
subsequent
evidence,
may be
taken, when.

And the condition as to time does not preclude a purchaser from taking subsequent objections arising out of evidence called for before the expiration of the limited

(*x*) *Page v. Adam*, 4 Beav. 269. 106.

(*y*) *Tanner v. Smith*, 10 Sim. 410;
see the same case on appeal, 4 Jur.
310; *Cutts v. Thodey*, 13 Sim., 206.

(*z*) See *Morley v. Cook*, 2 Ha.

(*a*) *Morley v. Cook*, 2 Ha. 111.

(*b*) *Page v. Adam*, *ubi supra*;
Morley v. Cook, *ubi supra*; *Roberts v. Wylatt*, 2 Taunt. 268.

time (c) : such objections must, however, it is submitted, be taken within a corresponding period after the production of such evidence. Chapter IV.

It is usual, and proper, to insert a condition providing for a resale of the property, and forfeiture of the deposit, in case the purchaser fail to comply with the conditions; and that any deficiency upon such resale, together with the costs thereof, shall be borne by the purchaser; Equity, however, will, at least when the purchaser is bankrupt (d), set off the deposit against such deficiency; and the vendor's equitable right to the deposit in any case where the purchaser is able and willing to put him in the situation in which he would have been had the contract been duly performed, is doubtful (e) : if, upon a resale, the estate were to produce more than the original purchase-money, the purchaser who had violated his agreement could not call for an account of the surplus (f) : a stipulation that the purchaser making default shall pay a specified sum, (exceeding the amount of the deposit,) as liquidated damages, does not amount at law to a condition for the forfeiture of the deposit (g).

As to resale, and forfeiture of deposit; how far binding.

Condition for payment of penalty by purchaser not equivalent to condition for forfeiture.

In the preparation of special conditions it is important to remember, that a purchaser, unless specially precluded from so doing, may require evidence of all matters of fact stated in any condition which goes to restrict his *prima facie* rights (h) : it is, in fact, suggested by Mr. *Jarman* (i), that the ordinary condition throwing upon the purchaser the expense of procuring evidence to verify the abstract, does not preclude him from requiring all such information as to facts as is necessary to complete the abstract; so

Matters of fact stated must be proved.

Whether purchaser precluded from evidence, may require information.

(c) *Blacklow v. Laws*, 2 Hare, 40.

(d) *Ex parte Hunter*, 6 Ves. 94.

(e) Sug. 51; *Moss v. Matthews*, 3 Ves. 279.

(f) *Per Curiam*, 6 Ves. 97.

(g) *Palmer v. Temple*, 1 Per. & Dav. 379.

(h) *Symons v. James*, 1 Y. & C. C. 487.

(i) *Conv. v. ix.* p. 53.

Chapter IV. that, although precluded from requiring, except at his own expense, any evidence of a death (material to the title), he may yet insist on being informed when and where such death occurred; in many cases the expense of obtaining such information would be nearly the same as that of obtaining the usual evidence of the fact; and the point, although (it is conceived) not often insisted on in practice, may sometimes be usefully guarded against by the conditions.

(4.) *As to what special conditions are generally requisite in various specified cases.*

What conditions expedient on sale of inclosed lands.

Upon a sale of lands held under an Inclosure Act, it will often be expedient to negative the purchaser's *prima facie* right to evidence of the validity and regularity of the award (*j*): and attention must be paid to the rule which, when an allotment has been made indiscriminately in respect of lands held under different titles, requires the production and proof of all such titles; a rule which, if not guarded against, may occasionally lead to expenses which will swallow up the purchase-money.

Land formerly waste.

Where the property comprises strips of waste land, recently inclosed, some special stipulations as to title will almost invariably be necessary (*k*).

Enfranchised copy-holds.

Where the property has been recently enfranchised (*l*) the production of the manorial title must be guarded against, if the vendor be unable to produce it: or, if produced, it may be well to guard against the rule which

(*j*) 3 Dav. Conv. 58; but this seems to be rendered unnecessary by the 3 & 4 Vict. c. 31, in cases coming within its provisions: the want of enrolment of the award is remedied by the 3 & 4 Will. IV. c. 87, in cases where the award was executed

before the passing of the Act.

(*k*) See, as to the presumption of ownership of such strips, *Scoones v. Morrell*, 1 Beav. 251; *vide infra*, Ch. VIII.

(*l*) *Vide infra*, Ch. VIII.

enables a purchaser to require evidence of the manor having, since the enfranchisement, been enjoyed conformably with the earlier title (*m*).

Chapter IV.

Where, in the case of copyholds, the title depends upon grants, made by the lord of the manor, of part of the waste, it will, in general, be expedient to provide that no evidence shall be required of such grants being authorized by the custom of the manor; in some manors, however, the right is well established.

Copyholds
formerly
part of
lord's
waste.

Upon a sale of leaseholds, the following points will require attention.

Leaseholds.

To negative the purchaser's right to the production of the lessor's title, if, as generally happens, the vendor cannot produce it; if the interest to be sold be an underlease, the condition should (if so intended) clearly refer to the title as well of the sub-lessor as of the original lessor; if, however, the lease be by a Bishop, a purchaser has no *primâ facie* right to production, and any condition respecting the lessor's title may be omitted (*n*).

Against
production
of lessor's
title.

The covenants in the lease should never be referred to as "usual;" the preferable plan is, to produce an abstract or copy of the lease at the time of sale; and to state the intention so to do in the particulars or conditions, and to stipulate that the purchaser shall be deemed to have full notice of its contents.

Covenants
in lease, how
to be
noticed.

It is also, in general, necessary to provide, that certain specified evidence (usually the production of the last receipt for rent), shall be sufficient evidence of the performance of the covenants and conditions in the lease, up to the completion of the purchase (*o*).

As to evi-
dence of
covenants,
&c., having
been per-
formed.

(*m*) See 1 Jarm. Conv. by S. 83.

(*n*) *Vide infra*, Ch. VIII.

(*o*) With respect to the necessity of such a condition, see, as to Insurance, *Penniall v. Harborne*, 12 Jurist,

159: but the condition, it is conceived, would not avail if the purchaser could show that the conditions had been broken.

Chapter IV.

As to apportionment of rent and liabilities on sale in lots.

When leasehold property is sold in lots, it is also necessary to provide for the apportionment of the rents and liabilities under the lease: this cannot be done effectually where, as is usually the case, the lessor refuses, or is incompetent, to concur; underleases, (the original term being retained either by the vendor or one of the purchasers), with covenants for mutual indemnity, are frequently resorted to; in fact necessarily so, where, in the case of buildings, the original lease contains a covenant to insure against fire in a given sum: cross powers of distress and entry are often relied on in other cases; but the plan proposed, whatever it be, should be stated in the conditions (*p*).

On sale of renewable leaseholds.

Upon the sale of renewable leaseholds, it will probably be necessary to provide against the production of the title prior to the subsisting lease (*q*).

On sale of a reversion.

Upon the resale of a reversion, it may often be necessary to provide, that no evidence shall be required of the sufficiency of the consideration paid on the original purchase (*r*); if such purchase, however, were by auction, the condition would seem to be unnecessary (*s*).

(5.) *General remarks on special conditions.*

As to use of special conditions by trustees, &c.

Upon sales by trustees, mortgagees, and other persons filling a fiduciary character, great care is requisite in the use of special conditions; since, if improperly used, they may not only involve the vendors in personal liability to their *cestui que trust*, &c., but also prevent their making a good title.

When it amounts to breach of trust.

In order to have this effect the conditions must be unnecessary, and of such a depreciatory character that

(*p*) See 3 Dav. Conv. 84.

Madd. 373.

(*q*) *Vide infra*, Ch. VIII.

(*s*) *Shelley v. Nash*, 3 Madd. 232;

(*r*) See *Boswell v. Mendham*, 6

et vide infra, Ch. XIV.

their use amounts to a breach of trust: it may, however, often be difficult to determine whether a given condition comes within this definition. Chapter IV.

Upon a sale by a mortgagee, the use of conditions compelling a purchaser to take all objections within 21 days from the delivery of the abstract, that all copies of deeds, &c., not in the vendor's possession, should be obtained at the expense of the purchaser, that any mis-statement, &c., should not annul the sale but be the subject of compensation, and that the vendor might resell on breach of conditions by the purchaser, was considered by Lord *Langdale* to form no objection to the title (*t*).

Use of certain special conditions by mortgagee approved of.

Upon a sale by a mortgagee, with a title believed to be marketable although complicated, the use of a condition authorizing the mortgagee, in the event of objections, &c., being taken which he could not remove, to rescind the contract on returning deposit, interest, and costs, and of a condition that purchasers, whose purchase-money should not amount to a specified sum, should pay for their abstracts, (except the abstract of the mortgage deed,) was sanctioned by a late very eminent conveyancer.

On a sale in a single lot, there would seem to be considerable difficulty in drawing any distinction between a condition throwing on a purchaser the expenses of copies of deeds, &c., (as in *Hobson v. Bell*), and one imposing on him *any* expenses connected with the sale which would be incurred merely on his own requisition, whether regarding the verification of the abstract or otherwise: in each case the purchaser submits to pay certain indefinite expenses in the event of his insisting on their being incurred; and, in general, the trust estate probably saves in costs what it loses in purchase money. The case, however, is different on a sale in several lots, where the expenses of verifying

As to expenses, difference suggested between use of such conditions by trustees, &c. on sale in several lots and on sale in one lot.

(*t*) *Hobson v. Bell*, 2 Beav. 17; and see *Borell v. Dann*, 2 Hare, 443, 455.

Chapter IV. the abstract are thrown generally on the purchasers; for then, although the expenses can be but once saved to the estate, each purchaser may think that he will have to bear them, and may be supposed to reduce his biddings accordingly.

As to title &c., should be adapted to particular title.

Conditions restrictive of a purchaser's right to a marketable title, or the ordinary evidences of title, should be used only so far as may be requisite from the state of the title (*u*).

Power to sell under special conditions, its effect.

Powers of and trusts for sale, at the present day, usually authorize a sale "under special conditions as to title, evidences of title, expenses or otherwise;" such an authority may reasonably be supposed to give to a fiduciary vendor somewhat wider limits than he would otherwise enjoy, and would probably turn the scale in a doubtful case; but it is hard to say what is its precise effect; it certainly would not authorize capricious or obviously unnecessary conditions, and necessary or provident conditions may and should be used *without* an express authority: it has, however, become very usual to insert in such trusts and powers a declaration, that the use of unnecessary or improper conditions shall not affect the sale; but even such a declaration, of course, does not relieve a fiduciary vendor from liability to his beneficiaries.

As to declaration that improper conditions, &c. shall not affect purchaser.

Condition as to misdescriptions useless to trustees, &c.

And the condition as to compensation for misdescription by the vendor, cannot, it appears, be enforced upon a sale by trustees, &c. (*v*); although the use of the condition may not in itself be a breach of trust (*w*).

As to covenants on sale by trustees, &c.

Although it is a general rule that a trustee or mortgagee, &c., enters into no covenant except that against incumbrances (*x*), it is not unusual to insert a special condition to that effect.

(*u*) *Supra*, p. 34; see, however, *Borell v. Dann*, 2 Ha. 443, 445.

(*v*) *White v. Cuddon*, 8 Cl. & Finn. 766.

(*w*) See *Hobson v. Bell*, 2 Beav. 17.

(*x*) See *Worley v. Frampton*, 5 Ha. 560.

Lastly, it may be remarked, that those conditions which to an unprofessional eye appear the simplest, are often the most dangerous; and those which appear difficult and complex to the unlearned purchaser may not unfrequently produce an impression favourable to the title upon the mind of his legal adviser. The conveyancer who, upon the purchase of a large estate, peruses a series of special stipulations, which have evidently been framed with reference to points which might be made matters of serious annoyance by a litigious, but are of little practical importance to the willing, purchaser, is naturally disposed to believe that no real difficulties exist where minor objections have been so carefully anticipated; and, on the other hand, nothing is more common than to see conditions whose concise simplicity disarms the suspicion of the unprofessional reader, but whose sweeping clauses reduce counsel to the dilemma of either advising a client to complete under serious uncertainty whether he will acquire even a tolerable safe holding title, or of involving him in inquiries, which are almost sure to be heavily expensive, and may probably prove wholly unsatisfactory.

Chapter IV.
Concluding
remarks on
special con-
ditions.

Chapter V.

CHAPTER V.

AS TO THE SALE AND MATTERS CONNECTED THEREWITH.

1. *Auction, what it is.*
2. *Auctioneer, his liabilities, power, and remuneration.*
3. *Agent, his liabilities, power, and remuneration.*
4. *The deposit.*
5. *As to puffings and reserved biddings on a sale by auction.*

Auction;
what it is.

(1.) An auction, in the widest sense of the term, is any mode of sale, however conducted, in which the vendor comes under an express or implied obligation to part with the property to the highest bidder (*a*): an express direction to sell by auction, would, however, it is conceived, only authorize a sale by auction in the usual mode.

Direction to
sell by.

(2.) *As to the auctioneer, &c.*

Auctioneer
is personally
liable, if
selling
without
authority
or not dis-
closing
name of
principal.

An auctioneer selling without sufficient authority or not disclosing the name of his principal, is liable to the purchaser for his costs, and interest on his purchase-money if lying idle (*b*): and it has been held that if he sell, without at the time of sale disclosing the name of his principal, he is personally liable in damages for nonperformance of the contract (*c*).

Cannot vary

The auctioneer cannot, without express authority, dele-

(*a*) See Sug. 11.

(*b*) Sug. 44.

(*c*) Sug. 50; *Franklyn v. Lamond*,
4 C. B. 637.

gate the sale to another (*d*) ; nor can he, after the sale, vary the terms of the contract (*e*). Chapter V.
terms after sale.

Unless especially authorized, he has no power to receive more than the deposit : and if, as respects the deposit or any other part of the purchase-money which he is authorized to receive, he allow the purchaser to retain it, on his personal or any other security, he does so at his own risk (*f*). Can only receive deposit ; is liable if purchaser is allowed to retain it.

Until the purchase is completed he is a stakeholder of the deposit, and should not part with it except by consent of both vendor and purchaser (*g*) ; if both claim it, he may file a bill of interpleader (*h*) ; but, in so doing, he must not claim to retain his commission out of it (*i*) ; if, however, he be made a defendant to a bill for specific performance, and the deposit be brought into Court, he will be allowed to deduct his charges and expenses, subject to the question as to who shall ultimately bear them (*j*). Holds deposit as stakeholder :

inter-pleader

Allowed his charges out of deposit in suit for specific performance.

At Law, the costs of an auctioneer who has paid the deposit into Court under an interpleader order, have been allowed out of the deposit, leaving the purchaser to his remedy over against the vendor, although known to be insolvent (*k*). Allowed costs out of, at law.

After the purchase is completed, or before, with the consent of the purchaser, the auctioneer may, except in very special cases, safely pay the deposit to the vendor, although in embarrassed circumstances (*l*) ; if the purchase go off, May pay deposit to vendor after completion.

Is liable to

(*d*) Sug. 13 ; *Henderson v. Barnewall*, 1 Y. & J. 387.

(*e*) See *Blackburn v. Scholes*, 2 Camp. 343.

(*f*) Sug. 46.

(*g*) See *Smith v. Jackson*, 1 Madd. 620 ; and see *Wiggins v. Lord*, 4 Beav. 30, where the deposit was received by the vendor's solicitor.

(*h*) *Fairbrother v. Prattent*, Dan. 64.

(*i*) *Mitchell v. Hayne*, 2 Sim. & St. 63 ; and see *Bignold v. Audland*, 11 Sim. 28.

(*j*) *Annesley v. Muggridge*, 1 Madd. 593 ; *Yates v. Farebrother*, 4 Madd. 239.

(*k*) *Pitchers v. Edney*, 4 Bing. N. C. 721 ; and see *Reeves v. Barraud*, 7 Scott, 281.

(*l*) *White v. Bartlett*, 9 Bing. 378.

Chapter V.

action for,
by pur-
chaser, if
contract
rescinded.

His com-
mission, if
estate sold
by private
contract.

Claim to,
defeated by
negligence.

Trustee
acting as
auctioneer
has no
commission.

If auction-
eer insol-
vent, loss
falls on
vendor.

Is agent for

the purchaser may recover the deposit from the auctioneer in an action at law (*m*): but cannot claim interest, although the auctioneer may actually have made a profit upon it (*n*).

The amount of his remuneration, unless (as it should be) settled by agreement, depends upon custom; an agreement that he shall receive nothing if there be no sale, will not deprive him of his commission, if, after he has taken the usual steps preparatory to a sale, the estate be sold by the owner by private contract (*o*): but where an agent was to receive 100*l.* for commission, "one third down and the remaining two thirds when the abstract of conveyance is drawn out," and an abstract of title was delivered, but the contract then went off, he was not allowed to recover from his principal the two-thirds which remained unpaid (*p*).

And the auctioneer's (or agent's) claim to remuneration will be defeated by any negligence on his part, as to the mode of conducting the sale or otherwise, whereby the sale is defeated (*q*): and an executor or trustee acting as auctioneer in the sale of the trust property cannot charge commission (*r*).

As a general rule, any loss occasioned by his insolvency or *mala fides* falls on the vendor as his employer (*s*): but a fiduciary vendor will not be personally responsible for such loss, if he have acted prudently and under proper advice in the matter (*t*).

The auctioneer is, as is also his clerk (*u*), the agent of

(*m*) *Burrough v. Skinner*, 5 Burr. 2639; *Maberley v. Robins*, 5 Taunt. 625.

(*n*) *Harington v. Hoggart*, 1 Barn. & Ad. 577.

(*o*) *Rainy v. Vernon*, 9 Car. & P. 559; *Driver v. Cholmondeley*, *ibid.* n.

(*p*) *Alder v. Boyle*, 11 Jur. 591.

(*q*) *Jones v. Namey*, 13 Pri. 76.

(*r*) *Kirkman v. Booth*, 11 Beav. 273.

(*s*) See Sug. 50, and cases there cited.

(*t*) *Edmonds v. Peake*, 7 Beav. 239.

(*u*) *Bird v. Boulter*, 1 Nev. & M. 313; *Henderson v. Barnewall*, 1 Y. & J. 387.

both vendor and purchaser within the meaning of the 4th section of the Statute of Frauds; and, as such, can bind them by entries in the sale-book (*v*); and, as respects the purchaser, the rule seems to be the same although he bid by an agent (*w*); it appears, however, to be doubtful, whether either party will be bound who, after the lot is knocked down but before the entry is made, revokes the auctioneer's implied authority (*x*); so inconvenient a doctrine the Courts would, doubtless, repudiate, if possible.

But the auctioneer's authority may be revoked by the vendor at any time before the sale; and such revocation has been held valid against parties purchasing in ignorance of it (*y*).

It seems to be doubtful whether he can sue a party for whom he personally signs as agent (*z*); but he can maintain the action when the entry has been made by his clerk on behalf of the Defendant (*a*).

Chapter V.

both parties within the Statute of Frauds.

Revocation of his authority after lot sold, before entry of name.

Revocation of authority before sale binds purchaser without notice.

His right to sue party for whom he acts as agent.

(3.) *As to Agents.*

An agent, either for purchase (*b*) or sale (*c*) of an estate, may, unless the principal be a corporation (*d*), be appointed by word of mouth; but a verbal appointment, of course, is

Agent.

How may be appointed.

(*v*) *Emmerson v. Heelis*, 2 Taunt. 38; *Kemey's v. Proctor*, 1 Jac. & W. 350.

(*w*) *Emmerson v. Heelis*, 2 Taunt. 38.

(*x*) See *Blagden v. Bradbear*, 12 Ves. 466; *Mason v. Armitage*, 13 Ves. 25; *Malins v. Freeman*, 2 Keen, 25; Sug. 131.

(*y*) *Manser v. Back*, 6 Ha. 443; *sed aliter*, if the auctioneer had a written authority, and parties bid

upon the faith of it; *vide infra*.

(*z*) *Farebrother v. Simmons*, 5 B. & Ald. 333; *Wright v. Dannah* 2 Camp. 203.

(*a*) *Bird v. Boulter*, 1 Nev. & M. 313.

(*b*) Sug. 130.

(*c*) Sug. 131.

(*d*) *Corporation of Ludlow v. Charlton*, 6 Mee. & W. 815; *Cope v. Thames Haven Company*, 3 Exch. 841; 6 Rail. Ca. 83.

Chapter V. generally inexpedient: neither of the contracting parties can, it appears, act as agent for the other (*d*).

Private instructions to.

Where the agent has a written authority, parties dealing with him upon the faith of it are unaffected by private restrictions imposed upon him by his principal, but of which they have no notice (*e*).

Apparent agent.

Also, a person may so deal with third parties, as to warrant them in the belief that another is his agent; and he will, in Equity, be bound by any unauthorized agreement of the agent which he (the principal) has given them reason to consider authorized (*f*).

For purchaser, how far he can bind his principal.

An agent, employed to bid for an estate, and not limited as to price, can bind his principal to any amount; if, being limited, he exceed the limit, and his want of authority be unknown to the other party, he himself is bound (*g*), and his principal is said to be free (*h*): but the production of written instructions authorizing him to give a certain price, does not preclude parol evidence of his having had a general discretionary power (*i*).

Agency, if denied, may be established.

As between the vendor and an alleged agent for purchase, but whose authority is denied, the agent has all the rights and liabilities of a principal; the fact of agency, if denied, may, of course, if practicable, be established, by the agent against the principal, the principal against the agent (*j*), or the vendor against the principal.

(*d*) *Wright v. Dannah*, 2 Camp. 203; *Farebrother v. Simmons*, 5 Barn. & Ald. 333.

(*e*) *Neeld v. Duke of Beaufort*, 5 Jur. 1123; see, as to restrictions on an auctioneer, *Manser v. Back*, 6 Hare, 443.

(*f*) See *Smith v. East India Company*, 16 Sim. 76.

(*g*) See *Jones v. Dourman*, 4 Ad. & E., N. S. 235, n.

(*h*) *Hicks v. Hankin*, 4 Esp. Ca.

114; Amb. 498; 10 Ves. 400; Sug. 46; *Quære*, however, whether the rule should not be, that where the agent exceeds the limit, the principal shall be bound to the extent of such limit; provided, in the case of an auction, that it exceed the amount of the last adverse bidding.

(*i*) *Hicks v. Hankin*, 4 Esp. Ca. see p. 116.

(*j*) *Taylor v. Salmon*, 4 Myl. & Cr. 134.

There is not, as a general rule, any objection to a contract for purchase entered into in the name of an agent, upon the ground of his having professed to deal on his own account (*k*) ; but in the converse case of a purchaser professing to contract as agent for another, Equity would refuse specific performance against the vendor, if it appeared that the name of the assumed principal was used as an inducement to a bargain which would not otherwise have been entered into (*l*).

Chapter V.

Contract by agent, assuming to be principal, enforced.

By nominal agent, when enforced.

An agreement entered into by an attorney or agent, should, in order to avoid any question as to personal liability, be made and signed, by him, as attorney or agent, in the name of the principal (*m*) ; in fact, if a person by deed covenant for himself and his heirs for the acts of another, he is personally liable, although described as agent (*n*) ; it has, however, been held, in a recent case, that if a person enter into a contract in writing, describing himself as agent and naming his principal, he is not personally liable unless he had no authority to make the contract, or, in making it, exceeded his authority (*o*) ; and even where a person, without authority, signs an instrument in the name of and as agent for another, he cannot be treated as a party to such instrument, and be sued upon it, unless he be shown to have been really the principal ; although he may probably be liable in an action for damages for the misrepresentation (*p*) : where the agent of the vendor, at the purchaser's request, signed the agreement in his (the agent's) own name, this was held not to bind the purchaser (*q*).

Agreements by agent, how to be signed.

Agent, when personally liable.

(*k*) Sug. 242 ; *Nelthorpe v. Holgate*, 1 Coll. 203.

(*l*) *Phillips v. Duke of Bucks*, 1 Vern. 227 ; and see other cases cited in Sug. 244 ; and see Ch. XVIII. *infra*.

(*m*) Sug. 53.

(*n*) See *Appleton v. Binks*, 5 East,

148 ; and cases cited, Sug. 53.

(*o*) *Downman v. Jones* (in error),

9 Jur. 454, Ex. Ch.

(*p*) *Jenkins v. Hutchinson*, 13 Jur. 763, Q. B.

(*q*) *Graham v. Musson*, 5 Bing. N. C. 603.

Chapter V.

Agent of undisclosed principal may vary terms of payment.

Cannot receive purchase-money without authority.

Order upon, to pay purchase-money to a third person.

Commission.

Authority of, may be revoked ;

or unauthorised act adopted.

But not by

After the contract is entered into, an agent for sale, if and so long as his principal's name is undisclosed, may vary the terms of payment (*r*) ; he cannot, without special authority, receive the purchase-money (*s*) ; if authorized to receive it, a direction from his principal to pay it to a third party, is irrevocable, if given for valuable consideration (*t*).

If an agent for sale is to receive for commission a percentage on the sum obtained, he cannot claim it in respect of any part of the purchase-money which remains unpaid (*u*) : unless such nonpayment be occasioned by the wilful act or default of the vendor (*v*) : if several agents are employed, and one find and another conclude the bargain with a purchaser, each may claim a commission ; but not the usual commission, viz., *2l. per cent.* (*w*).

The authority of an agent, either for sale or purchase, may be revoked at any time before he has entered into a binding agreement (*x*) ; if he act without authority, his alleged principal, even although he have had no previous communication with him, or were ignorant of his name at the date of the contract, may adopt his acts (*y*) : nor is it necessary that the principal should be competent to contract at the date of the agreement ; for instance, an administrator may adopt a contract entered into before the grant of the letters of administration (*z*) : but a contract

(*r*) *Sug.* 47 ; *Blackburn v. Scholes*, 2 Camp. 343.

(*s*) *Mynn v. Jolliffe*, 1 Moo. & R. 326 ; and see further, *infra*, Ch. XIII. as to payment to agents.

(*t*) *Metcalf v. Clough*, 2 Man. & Ry. 178.

(*u*) *Bull v. Price*, 7 Bing. 237.

(*v*) *S. C.*, see p. 241.

(*w*) *Murray v. Currie*, 7 Car. & P. 584.

(*x*) *Farmer v. Robinson*, 2 Camp.

339, n. ; *Manser v. Back*, 6 Ha. 443 ; *Smart v. Sanders*, 3 C. B. 380.

(*y*) *Maclean v. Dunn*, 4 Bing. 722 ; and see *De Beil v. Thomson*, 3 Beav. 469 ; *London and Birmingham Railway Company v. Winter*, Cr. & Ph. 57 ; and *Wilson v. Tummon*, 6 Sc. N. R. 894.

(*z*) *Foster v. Bates*, 12 Mee. & W. 226.

entered into by A., expressly as agent for B., cannot be adopted by C. (*a*).

The clerk of an agent for sale has, it appears, no implied authority to bind the principal (*b*).

Chapter V.

any other
than the
nominal
principal.
Clerk of
agent
cannot bind
principal.

(4.) *As to the deposit.*

The deposit is a payment in part of the purchase-money (*c*); and the purchaser cannot elect to forfeit it and avoid the agreement (*d*).

Deposit is a
part pay-
ment.
Purchaser
cannot elect
to forfeit it.

Even the deposit should not be paid to a mere agent for sale, without express authority from the vendor; if the authority be for the agent to receive it at a particular time, or in a particular manner, of course it cannot be safely paid at any other time, or in any other manner (*e*); the purchaser, however, will not be liable for loss arising from his having followed any such special authority as to the mode of payment (*f*).

To whom
and how it
should be
paid.

The deposit cannot safely be paid by the purchaser by being set off in account with the auctioneer or agent, except under the special circumstances of his being able to show the existence of a debt of equal amount due from the vendor to the auctioneer or agent, and that the latter was authorized by the vendor to retain the deposit on account of such debt (*g*); so, if, instead of making a cash payment, the purchaser give his acceptance, payment of the bill when due is no defence to an action by the vendor, if the bill never came into his possession (*h*).

Not to be
paid by
settlement
of accounts
with agent,
except
under
special cir-
cumstances;

nor by
acceptance.

(*a*) *Wilson v. Tummon*, 6 Man. & Gr. 236; 6 Sc. N. R. 894.

(*f*) Sug. 47.

(*b*) *Coles v. Trecothick*, 8 Ves. 234.

(*g*) *Barker v. Greenwood*, 2 Y. & C., Ex. 414; *Young v. White*, 7 Beav. 506; *Hauley v. Cassan*, 11 Jur. 1088.

(*c*) Sug. 48.

(*d*) 2 Mer. 506.

(*h*) *Sykes v. Giles*, 5 Mee. & W. 645.

(*e*) See *Young v. Guy*, 8 Beav.

Chapter V.

Cheque for,
when void.

If a cheque be given for the deposit, an action on the cheque may be resisted upon any ground which would have enabled the purchaser to recover at Law the deposit if actually paid (*i*).

Purchaser
not bound
by invest-
ment of,
except in
special
cases.

If a purchaser become entitled to a return of his deposit, he can, in the absence of special agreement, claim the specific sum paid, with interest; and will not be prejudiced or advantaged by any fall or rise in any securities in which it may have been invested; unless such investment were made with his assent, (which will not be assumed from his making no reply to notice of the investment (*j*),) or, (in the case of a bill being filed for specific performance,) under the authority of the Court; in which cases the investment will be at his risk and for his benefit (*k*): and the same rules apply to an investment of the purchase-money by the purchaser, pending discussions as to title, &c.

Forfeiture
of, when
relieved
against.

Equity will, in general, relieve the purchaser against forfeiture of his deposit, if he be able and willing to give to the vendor the full benefit of the contract (*l*): its return, with interest, may be directed even in a suit for specific performance, where the bill is dismissed, if the vendor be Plaintiff; but not if the purchaser be Plaintiff (*m*); nor, where the vendor is Plaintiff, if the bill be dismissed without any decision upon the question of title, but for *laches*, or on some other collateral ground (*n*).

May be
retained by
vendor, if
purchaser
die without
heir; *semble*.

If the purchaser die before obtaining a conveyance, intestate and without an heir, it seems probable that the vendor might retain both the estate and the deposit (*o*).

(*i*) *Mills v. Oddy*, 6 Car. & P. Ves. 279.
728.

(*j*) See *Roberts v. Massey*, 13 Ves.
561.

(*k*) See *Poole v. Rudd*, 3 Bro. C. C.
49; Sug. 50, 51.

(*l*) Sug. 51; *Moss v. Matthews*, 3

(*m*) Sug. 51; see *Williams v. Edwards*, 2 Sim. 78; see also *Gee v. Pearce*, D. G. & S. 325.

(*n*) *Southcomb v. Bishop of Exeter*,
6 Ha. 225, 228.

(*o*) Sug. 337.

As a general rule, if the deposit be lost through the insolvency of the auctioneer, the loss falls on the vendor (*p*). Chapter V.
Loss of, by insolvency of auctioneer.

(5.) *As to puffers and reserved biddings.*

Unless the property be expressly or impliedly offered for sale without reserve (*q*), it appears settled that the employment of a bidder to prevent its going at an undervalue is allowable in Equity (*r*); but the rule is not so extended as to authorize the employment of more bidders than one, even although they are limited to the same sum (*s*); nor even of a single bidder for the purpose of enhancing the price indefinitely (*t*): but, on a sale in lots, several bidders might, it is conceived, be employed for different parts of the property, provided that no lot were protected by more than one bidder: at Law, the rule as respects the employment of a single bidder seems unsettled; Sir *Edward Sugden* seems to consider that the authorities preponderate in favour of the practice (*u*); however, in a very recent case, the Court of Exchequer maintained the contrary doctrine, and laid down broadly that the employment of a single bidder to protect the property would vitiate the sale at Law, unless the intention to do so were expressly notified: but this opinion was extra-judicial; the sale, (in the case before the Court,) having been advertised as to be made without reserve (*v*).

Puffers.
One bidder allowed in equity for protection, unless the sale is without reserve.

Rule different at law; *semble*.

Equity, in fact, seems to favour the employment of a Purchasing

(*p*) *Supra*, p. 82.

(*q*) *Meadows v. Tauner*, 5 Madd. 34; *Robinson v. Wall*, 2 Phill. 372; and see *Thornett v. Haines*, 15 Mees. & W. 367.

(*r*) *Woodward v. Millar*, 2 Coll. 279; and see Sug. 15, 16; and earlier cases there cited.

(*s*) *Wheeler v. Collier*, 1 Mood. &

Malk. 123; and see 15 Mees. & W. 372; and Sug. 17.

(*t*) 12 Ves. 483.

(*u*) Sug. 16.

(*v*) *Thornett v. Haines*, 15 Mees. & W., see pp. 371, 372; and see *Wheeler v. Collier*, 1 Mood. & Malk. 123.

Chapter V.

by mistake,
specified
performance
not enforced
against.

person to protect the property ; for it has refused to enforce specific performance against a vendor, in the several cases of his known agent having bid for the purchaser and been mistaken for a puffer (*w*), and of the person actually employed to bid for the vendor having neglected so to do (*x*) : so, in a converse case, where, upon a sale of estates belonging to several vendors, the person employed to protect one estate, by mistake purchased another, the bill against him for specific performance was dismissed (*y*).

(*w*) *Twining v. Morrice*, 2 Bro.
C. C. 326.

(*y*) *Malins v. Freeman*, 2 Kee. 25.
(*x*) *Mason v. Armitage*, 13 Ves. 25.

CHAPTER VI.

Chapter VI.

AS TO THE AGREEMENT.

1. *As to the general necessity for a written agreement.*
2. *The preparation of formal agreements.*
3. *What informal documents may constitute an agreement.*
4. *The signature.*
5. *The stamps.*
6. *As to illegal agreements.*

(1.) UNDER the Statute of Frauds (*a*), a written agreement, signed by the party to be charged, or his agent, is generally necessary to the validity of any contract for the sale or purchase of lands, tenements, or hereditaments, or any estate or interest in or concerning them; whether such estate or interest be subsisting, or be proposed to be created *de novo*; and the Act extends to sales by auction (*b*), and in Bankruptcy (*c*); but not to sales before a Master, or to purchases under the Order of the Court, if the owner of the estate make no opposition to the confirmation of the report approving of the purchase (*d*).

Written agreement generally necessary under Statute of Frauds.

What sales not within the statute.

And although an actual demise by parol for any term not exceeding three years, at a rent not less than two thirds of the improved value, is valid under the 2nd section of the Statute, an executory agreement for such a demise

Parol executory agreement for lease,

(*a*) 29 Car. II. c. 3, see s. 4; Sug. 98.

(*c*) *Ex parte Cutts*, 3 Dea. 267, Lord Cottenham.

(*b*) Sug. 135; see *Att.-Gen. v. Day*, 1 Ves. 218; and 12 Ves. 472.

(*d*) See note (*b*).

Chapter VI.

or for
assignment
of term less
than three
years, void.

Whether
parol
license is
valid.

Seemle, not.

Any agree-
ment sub-
stantially
for a sale, is
within the
statute.

is void unless in writing (*e*): so, a parol agreement by a lessee for an assignment of the residue of his term (being less than three years), is void, and cannot, it would seem, operate as an underlease (*f*).

The first section of the Act, which renders a writing necessary for the creation of "all leases, estates, interests of freehold, or terms of years, or any uncertain interest, of, in or out of any lands, &c.," has been held not to extend to a license; *e. g.*, a license to A., in consideration of a yearly payment, to stack coals on a piece of ground for seven years, with the sole use of the land so employed (*g*): this decision, however, Sir *E. Sugden* observes (*h*), appears to be in the very teeth of the Statute; and, although it has been often followed (*i*), its authority seems to be destroyed by subsequent cases which decide that an easement cannot be granted without deed (*j*); it is also conceived that a parol executory agreement for such a license would probably be invalid; the words, "in or concerning," in the 4th section, being, apparently, more comprehensive than the words, "of, in, or out of," in the 1st section.

Any arrangement which is substantially, although not professedly, a sale of an interest in land, is within the 4th section, and requires a written contract: *e. g.*, an agreement by a person possessed of a term for years, to give up possession to another, and allow him to become tenant for the remainder of the term, in consideration of his paying in part for certain repairs (*k*); or an agreement by the termor to quit possession on a certain day, and pay all outgoings up to that time, in consideration of a sum of money to be paid to him by a party who has agreed with the land-

(*e*) Sug. 95.

(*f*) *Barrett v. Rolph*, 14 Mee. & W. 348.

(*g*) *Wood v. Lake*, Say. 3.

(*h*) Sug. 97.

(*i*) *Ibid*.

(*j*) See 1 Jarm. Conv. by S. 289, and cases there cited; and, in particular, *Bird v. Higginson*, 4 Nev. & M. 505.

(*k*) *Buttmer v. Haynes*, 3 Jur. 704.

lord for a lease of the premises on the termination of the subsisting term (*l*) ; or an agreement by a termor, under similar circumstances, that he will part with the land, and that the intended lessee shall take it (*l*).

So, a parol agreement by A. with an occupying tenant to pay him 100*l.*, upon the tenant surrendering his lease, and procuring the landlord to accept A. as tenant, is void (*m*) : nor can the tenant sue for the consideration, upon the contract, although he have performed his part of it ; but he may sue upon an account stated, if, after such performance, A. have admitted that he is indebted to him in the amount of the consideration (*m*).

An agreement void under the 4th section, may, until countermanded, operate as a license, so as to excuse what would otherwise be trespass (*n*).

Void agreement may as a license excuse trespass.

And the transfer in writing of a parol, and therefore void, agreement for purchase of an estate, will be a good consideration as between transferror and transferee, if the latter actually obtain a conveyance from the vendor (*o*) : so, also, if an agent for purchase enter into a parol agreement, and pay the purchase-money, and procure a conveyance, he can sue his principal for the amount (*p*).

Written transfer of parol agreement.

The 4th section has been held to extend to agreements for sale of shares in a Mining Company (*q*) : but not of shares in a Railway Company ; at least if the Act of Incorporation makes them personal estate (*r*).

Mining but not Railway shares within the 4th sect.

Questions frequently arise as to the necessity for a written agreement for the sale of growing crops ; the law upon the subject can hardly be considered as settled (*s*) ;

Sale of growing crops.

(*l*) *Smith v. Tombs*, 3 Jur. 72.

(*p*) *Pawle v. Gunn*, 4 Bing. N. S.

(*m*) *Cocking v. Ward*, 1 C. B. R. 445.
358.

(*q*) *Boyce v. Greene*, Batty, 608.

(*n*) *Carrington v. Roots*, 2 Mee. & W. 248.

(*r*) *Bradley v. Holdsworth*, 3 Mee. & W. 422 ; *Duncuft v. Albrecht*, 12

(*o*) *Seaman v. Price*, 1 Ry. & Moo. 195.

Sim. 189 ; Aff. 199.

(*s*) Sug. 101.

Chapter VI. but the following appears to be the general result of the authorities.

The point to be determined in such cases is, whether the interest contracted for be an interest in land within the meaning of the 4th section of the Statute of Frauds;—in which case a written agreement is necessary;—or whether the contract be merely for the sale of chattels; in which case, however, unless the price be under 10*l.*, there must, under the 17th section, be a written agreement or memorandum, or part payment of the price, or part acceptance of the goods.

Cases within
the 4th sect.

An agreement for sale of the exclusive right to the vesture of land, or for sale of crops which would not go as emblements to the executor (*t*), as mowing grass (*u*), standing underwood, poles, or timber, is within the 4th section; nor, in the case of grass, does it appear to be material whether it is to be mowed or fed off by the purchaser; that is, if, in the latter case, he is to have the exclusive right to it (*v*): so, also, an agreement for the sale of growing fruit, (*e. g.*, pears) (*x*), is within the 4th section.

Cases not
within the
4th sect.

But if the agreement be for sale of the crop after the seller shall have reduced it to a chattel by severance from the freehold, as where standing timber is to be felled by the vendor, the 4th section does not seem to apply (*y*): and the same distinction would, it is conceived, exist in agreements for the sale of gravel (*z*), stone, or other minerals: nor does the 4th section seem to affect sales of crops which would go as emblements (*a*): such as hops (*b*),

(*t*) See judgment in *Evans v. Roberts*, 5 B. & C. 829; Sug. 99.

(*u*) *Crosby v. Wadsworth*, 6 East, 602.

(*v*) See *Jones v. Flint*, 10 Ad. & E. 760.

(*x*) *Rodwell v. Phillips*, 9 Mee. & W. 501; *sed qu.* Whether so, if the crop is mature at the time of sale?

(*y*) *Smith v. Surman*, 9 B. & C. 561; and see 1 Crompton & Mee. 105.

(*z*) See *Coulton v. Ambler*, 13 Mee. & W. 403.

(*a*) Sug. 100; but see *Waddington v. Bristow*, 2 Bos. & P. 452.

(*b*) *Evans v. Roberts*, 5 B. & C. 829; see judgment; and Sug. 99.

wheat, potatoes, turnips, &c. : nor does it appear material in such cases whether the crop at the time of sale be mature or otherwise, or whether it is to be removed by the buyer or seller, or to be paid for by the quantity, or by the acre ; and even in the case of grass, if the vendor retain possession of the land, and the right of turning on his own cattle, and the purchaser have no right of severance, but only to feed it off along with the vendor, the agreement is merely for agistment, and is not within the 4th section (*w*) : but in none of these cases is it prudent to dispense with a written contract.

And a parol agreement, for the sale of growing crops, which would otherwise be void under the 4th section, may be good as between outgoing and incoming tenants (*x*) : but where a farm is let by parol, a sale of the growing crops by the lessor to the incoming tenant, seems to require a written contract under the 4th section (*y*).

Parol agreement good between tenants ;

but not as between lessor and incoming tenant ;

And although an agreement be void under the 4th section, the seller, (except perhaps the parties be lessor and tenant,) can recover the value of the crop if it be taken or received by the purchaser : but he cannot recover on the terms of the agreement, but only on a *quantum meruit* (*z*).

Vendor's remedy if purchaser take the crop.

A sale of tenant's fixtures by the tenant to the landlord, has been held not to be within the 4th section, although they be sold while attached to the freehold (*a*).

Parol agreement for sale of tenant's fixtures sufficient.

An agreement by a tenant to pay an increased sum by way of rent, in consideration of improvements to be made by the landlord, has been held not to be within the Act ; and therefore to be valid although by parol (*b*) : but a dif-

Agreement for increase, or abatement, of rent.

(*w*) *Jones v. Flint*, 10 Ad. & E. 760.

(*x*) *Mayfield v. Wadsley*, 3 B. & C. 357 ; and see Sug. 100.

(*y*) *Lord Falmouth v. Thomas*, 1 Cromp. & Mees. 89.

(*z*) 1 Cromp. & Mees. 109.

(*a*) *Haller v. Runder*, 1 Cr. M. & R. 266.

(*b*) *Donnellan v. Reade*, 3 B. & A. 899, 904 ; *Hoby v. Roebuck*, 7 Taunt. 157.

Chapter VI. ferent rule has been laid down as respects an agreement for abatement of rent (*d*).

Void agree-
ment for
(*inter alia*)
the sale of
land, where
void *in toto*.

If an agreement relating to the sale of land be void under the 4th section, it will also be void as respects any other matters which are either inseparably mixed up with, or are dependent upon, the principal agreement: *e. g.*; where a tenant agreed to rent a furnished house, and the landlord was to supply additional furniture after the tenant had taken possession, it was held, that the want of a written contract was a bar to an action for non-delivery of the furniture (*e*); so, upon a parol agreement to let a house, and to make certain repairs, which the tenant was to pay for, it was held that the landlord could not sue him for the cost of such repairs (*f*).

(2.) *As to the preparation of formal agreements.*

As to formal
agreements.

Upon formal agreements for sale, few questions arise distinguishable from those which have been already considered with reference to the particulars and conditions.

As to
naming the
representa-
tives of the
parties.

In framing such agreements, it is usual to make the parties agree, each "for himself, his heirs, executors, and administrators;" the insertion of the word "heirs," however, is scarcely correct, unless the instrument be under seal; and it is not necessary, although the general practice, to name the personal representatives.

Agreement,
on sale by
auction,
refers to
particulars,
&c.

Upon a sale by auction, the agreement, of course, refers to, and is generally written or printed upon a copy of, the particulars and conditions.

What to be
comprised in
agreement

Upon a sale by private contract, the agreement, as a general rule, comprises whatever stipulations and other

(*d*) *O'Connor v. Spaight*, 1 Sch. & Lef. 306.

(*e*) *Mechelen v. Wallace*, 7 Ad. & E. 49.

(*f*) *Vaughan v. Hancock*, 10 Jur. 926; and see *Lord Falmouth v. Thomas*, 1 Crompt. & Mees. 89.

matter would, had the sale been by auction, have been comprised within the particulars and conditions ; except such matter as exclusively applies to an auction ; when it is probable that special stipulations, as to title, &c., will be necessary, the agreement should be prepared in blank before the estate is offered for sale.

Chapter VI.
on sale by
private con-
tract.

In preparing agreements for the sale of land to promoters of public undertakings, care should be taken to state whether the purchase-money is to be in lieu of those accommodation works which the promoters are *primâ facie* bound to make and maintain for the owners of adjoining land ; and whether the ordinary or statutory rule as to the expenses of the purchaser is to operate (*g*) : the agreement for sale to a Railway or Waterworks Company, should, if such be the intention, expressly state that the mines and minerals are included in the purchase (*h*).

Matters to
be provided
for, in agree-
ment for
sale to pub-
lic com-
panies, &c.

(3.) *As to what informal documents may constitute an agreement.*

Informal agreements give rise to questions of greater difficulty.

Informal
agreements.

We may lay down as general, although not universal, rules, 1st, that any writing signed by the party to be charged, or his agent, and which, either expressly or by reference to other writings, determines the parties to and subject-matter of a contract, and fixes, or provides the compulsory means of fixing, all its terms, is a sufficient agreement within the Statute ; and, 2ndly, that no writing is a sufficient agreement, which fails in any of the above-mentioned particulars.

What may
be a suf-
ficient
agreement
within the
statute.

Thus, letters are constantly held to constitute a binding contract ; and often where such a result is a surprise upon

Letters.

(*g*) See Frend and Ware's Rail-
way Conveyancing, p. 146.

(*h*) See 8 & 9 Vict. c. 20, sect.
77 ; and 10 & 11 Vict. c. 17, s. 18.

Chapter VI.

Receipt for
purchase
money.

Entry of
sale in
auctioneer's
book.

Arbitration
bond.

Notice by or
to Railway
companies,
&c.

the writers (*i*) : and a letter addressed by either a vendor, or, it would appear, a purchaser, to a third person, with directions incidental to the carrying out of the agreement : —*e.g.*, the delivery of title deeds, or preparation of the conveyance—may suffice to bind the writer (*k*) : so, the vendor's receipt for the purchase-money or deposit, or a similar receipt signed by the auctioneer, or the entry of sale made by him in his books (*l*), or a bond of reference to a surveyor to settle the price to be paid by the purchaser, would, it appears, be sufficient (*m*).

So, notice given by a Railway or other Public Company of their intention to exercise a power of compulsorily taking land, if given to a person under no personal incapacity (*n*), constitutes a binding contract to the extent of fixing what land is to be taken (*o*), and cannot be withdrawn by the Company without the consent of the land-owner (*p*) ; and the price, if not settled by agreement, must be determined in the manner pointed out by the Act of Parliament (*q*) ; but notice by a Company, under the

(*i*) *Kennedy v. Lee*, 3 Mer. 441.
“The same construction must be put upon a letter, that would be applied to the case of a more formal instrument ; the only difference being, that a letter or correspondence, is generally more loose and inaccurate in respect of terms, and creates a greater difficulty in arriving at a precise conclusion.” *Per* Lord Eldon, *ibid.* 451 ; see *Thomas v. Blackburn*, 1 Coll. 301.

(*k*) *Owen v. Thomas*, 3 Myl. & K. 353 ; *Rose v. Cunynghame*, 11 Ves. 550 ; Sug. 122.

(*l*) *Coles v. Trecothick*, 9 Ves. 234 ; *Blagden v. Bradbear*, 12 Ves. 466 ; Sug. 114, 121.

(*m*) *Per* Lord Rosslyn, 6 Ves. 17.

(*n*) *Midland Counties Railway*

Company v. Oswin, 1 Coll. 74.

(*o*) *Adams v. Blackwall Railway Company*, 14 Jur. 679, L. C.

(*p*) *Tawney v. Lynn and Ely Railway Company*, 16 L. J., N. S., Ch. 282, V. C. E. ; and see *Reg. v. Birmingham and Oxford Junction Railway Company*, 15 L. T. 392.

(*q*) See *Salmon v. Randall*, 3 Myl. & C. 439 ; *Stone v. Commercial Railway Company*, 4 Myl. & Cr. 124 ; *Walker v. Eastern Counties Railway Company*, 6 Ha. 594. Where a will gave to A. an option of purchase within a limited period, a mere verbal declaration to the trustees that he intended to take the property, the purchase-money remaining unpaid and the conveyance un-

Lands Clauses Consolidation Act, of their intention to take part only of premises used as a manufactory, does not amount to an agreement to take the whole, although under the 92nd section of the Act the owners may refuse to sell less than the whole (*q*) : it has been recently determined, that under the above Act, a Company may give a second notice to the same landowner in respect of land within the limits to which their compulsory powers extend, if, from unforeseen circumstances, the land taken under the first notice prove insufficient for the authorized purposes of the undertaking (*r*) : so, where a landowner is entitled by notice to require the Company to purchase his interest in lands affected by the undertaking, the service of such notice constitutes a binding contract (*s*).

Chapter VI.

Statutory power not exhausted by single notice.

But—and the case may be considered as exceptive from the first general rule—where B. had entered into a parol agreement to sell an estate to W., and B.'s agent made out and signed a rent-roll, entitled “Rent-roll of lands agreed to be sold by B. to W. from May 1762, at 21 years' purchase for the clear yearly rent,” and the amount of rent was then corrected by B. in his own handwriting, and the rent-roll so altered was delivered to W., and abstracts of title were also delivered, and B. sent letters to his creditors informing them of the sale, it was held, that there was no sufficient agreement (*t*) ; nor will a letter suggesting an abandonment of a parol agreement (*v*), take

Rent rolls, abstract, &c., insufficient ;

and letters to creditors ;

or letter written as an abandonment.

executed, was, of course, held insufficient to entitle him to the benefit of the option ; *Dawson v. Dawson*, 8 Sim. 346.

(*q*) *The Queen v. London and South-Western Railway Company*, 12 Jur. 973, Q. B.

(*r*) *Stamps v. Birmingham and Stour Valley Railway Company*, 2 Phill. 673 ; 6 Rail. Ca. 123 ; and see *Simpson v. Lancaster and Car-*

isle Railway Company, 15 Sim. 580.

(*s*) *Doo v. London and Croydon Canal Company*, 1 Rail. Ca. 257.

(*t*) *Whaley v. Bagnel*, 1 Bro. P. C. 345 : (the decision was upon the Irish Statute of Frauds, which corresponds with the English Act :) *Cooke v. Tombs*, 2 Anst. 420.

(*v*) *Gosbell v. Archer*, 2 Ad. & E. 500.

Chapter VI.

Recital of
agreement,
held suffi-
cient.

the case out of the Statute : but where, at Law, an agree-
ment was produced in the following words, viz. "A. having
agreed to purchase of B. for 250*l.* the two leasehold houses
situate &c., B. hereby agrees to paper and paint ; A. to
pay 230*l.* at the time of the contract, and the remaining
20*l.* on the completion of the painting : " it was held, that
the agreement to purchase, although recited as an existing
agreement, was to be considered as forming part of the
agreement produced (*w*).

Document
relied on
must con-
sist with
alleged
parol
agreement.

Whether
both parties
must be
named.

And it is, of course, necessary that the letter or other
document relied on should be consistent with the parol
agreement set up by the party relying on it (*x*).

As to both parties being named ;—it is stated by Lord
Cowper (Lord Keeper), " that if a man being in company
makes offers of a bargain, and then writes them down and
signs them, and another person then takes them up and
prefers his bill, there will be a sufficient agreement (*y*) ; " and the dictum, which was extrajudicial, is cited by Sir
E. Sugden (*z*) : however, in *Boyce v. Greene* (*a*) a memo-
randum in these words, " Sold 100 Mining Purdies at
17*s.* 6*d.*" and signed by the vendor, was held insufficient,
as not mentioning the name of the purchaser (*b*) : so, it
has been held, that, in order to bind the purchaser by the
auctioneer's entry, either the name of the vendor must
appear by the entry itself or in the conditions or par-
ticulars thereby referred to, or the auctioneer must bind
himself personally by his entry (*c*).

As to the
names in
the case of
an agree-

In the case of a letter, if the name of the party to whom
it is addressed appear in an indorsed direction, or be writ-

(*w*) *Hall v. Betty*, 4 Man. & G.
410.

(*x*) *Cooper v. Smith*, 15 East, 103.

(*y*) *Coleman v. Upcot*, 5 Vin. Ab.
527.

(*z*) *Sug.* 115.

(*a*) *Batty*, 608.

(*b*) See *Seagood v. Meale*, Prec.
Ch. 560 ; *Champion v. Plummer*, 1
Bos. & P., N. R. 254.

(*c*) *Wheeler v. Collier*, Moo. &
Malk. 123 ; and see *Jacob v. Kirk*,
2 Moo. & Rob. 221.

ten at the foot of the letter, no difficulty on the above point can arise: if an envelope be used, the name may often not appear in the letter; but the Court, it is conceived, would receive evidence connecting the envelope with the inclosure.

Chapter VI.
ment by
letter.

A letter, it may be remarked, binds the writer from the time of its transmission; not of its receipt by the other party (*e*): and a person bound to accept or reject an offer by a particular post, and duly posting his letter, is not responsible for delay in the post office (*f*); even although, by mistake, he date his reply a day in advance, so that, through such delay, the letter be delivered at a time apparently consistent with its erroneous date (*g*).

Offer by
letter, when
binding.

Party
accepting
offer is not
liable for
delay in
the post-
office.

A general description of the estate,—*e. g.*, “Mr. O.’s house” (*h*), or, “the property in Cable Street” (*i*), or, “the house in Newport” (*k*),—is sufficient; if parol evidence can be produced to show what property was intended: there must, however, be *some* description; *e. g.*, a memorandum that a party has disposed of “his writings,” (*i. e.*, title deeds,) is insufficient (*l*).

General
description
of property
sufficient.

But there
must be
some
description.

So, all the essential terms of the contract must be fixed, or, as in the case of the arbitration bond (*m*), the means of compulsorily fixing them with perfect accuracy must be provided; thus, a receipt for the deposit has been held insufficient, because it did not state either the price or what proportion the deposit bore to the price (*n*); so, where the price was fixed subject to variation in respect of a rent-charge, and it did not appear whether the amount

The writing
must fix, or
provide the
means of
fixing, all
the terms of
the agree-
ment.

(*e*) *Potter v. Sanders*, 6 Ha. 1. 150.

(*f*) *Adams v. Lindsell*, 1 B. & Ald. 681.

(*k*) *Owen v. Thomas*, 3 Myl. & K. 353.

(*g*) See *Dunlop v. Higgins*, 1 H. of L. Ca. 396.

(*l*) *Seagood v. Meale*, Prec. Ch. 560.

(*h*) *Ogilvie v. Foljambe*, 3 Mer. 61.

(*m*) *Supra*, p. 98.

(*n*) *Blagden v. Bradbear*, 12 Ves.

(*i*) *Bleakley v. Smith*, 11 Sim. 466.

Chapter VI. was 5s. or 1s. *per annum*, the defect was held fatal (*n*); so, upon a sale subject to conditions, the auctioneer's receipt or entry would be void, unless it were actually annexed, or clearly referred, to the conditions (*o*).

But need not specify them: a reference to other documents containing them is sufficient.

It is, however, not necessary that the terms should appear on the face of the instrument signed by the party to be charged; which, when an agreement has to be made out from correspondence, is seldom the case; it is sufficient if the instrument refer to other documents, (such as conditions of sale, previous letters, or, in fact, any other writings,) which contain the terms (*p*).

But the reference must be clear.

Such writings, however, must clearly be referred to (*q*); and, unless their entire contents are to form part of the agreement, it must distinctly appear what is and what is not to be so included: *e. g.*, where the signed writing referred to such of the clauses contained in a specified paper as had been read at a meeting between the parties, not stating *which* had been so read, it was held bad for uncertainty (*r*).

Patent ambiguity fatal; but parol evidence is admissible in aid of a defective reference, &c.

In the last case, it will be seen (*s*) that there was a defect *patent* on the face of the agreement: the agreement itself, according to its own grammatical construction, raised the question as to which of the clauses were intended; but, in the case of a mere imperfect reference to another instrument, parol evidence is admissible to ascertain its identity (*t*); so, parol evidence is admissible to explain the sense in which words, in themselves unintelli-

(*n*) *Lord Middleton v. Wilson*, Sug. 118.

(*o*) Sug. 121; *Hinde v. Whitehouse*, 7 East, 558, 569; *Kemworthy v. Schofield*, 2 B. & Ad. 945; and see *Coles v. Trecothick*, 9 Ves. 234.

(*p*) *Clinan v. Cooke*, 1 Sch. & Lef. 22, 33; *Allen v. Bennet*, 3 Taunt. 169; *Dobell v. Hutchinson*, 3 Ad. & El. 355; *Laythorpe v. Bryant*, 2

Bing. N. C. 735.

(*q*) *Boydell v. Drummond*, 11 East, 142; *Boyce v. Greene*, Batty, 608; *Jacob v. Kirk*, 2 Moo. & R. 221.

(*r*) *Brodie v. St. Paul*, 1 Ves. jun. 326, 333; see 1 Sch. & Lef. 36.

(*s*) See 1 Sch. & Lef. 36.

(*t*) See *Clinan v. Cooke*, 1 Sch. & Lef. 33; *Saunderson v. Jackson*, 2 Bro. & P. 238.

gible, were used by the parties (*t*) ; or the peculiar meaning which local, professional, or trade usage, has attached to particular expressions (*u*).

And it appears that, at least in the case of letters, there need not be any specific description of, nor even an *express* reference to, the prior documents ; it will be sufficient if the Court be clearly satisfied that a reference was in fact intended, and of the identity of the instrument.

But agreement need not expressly specify the instrument referred to.

For instance, where (*v*) A., the owner of W. farm, on the 5th July wrote a note in the third person to B., informing him that C. had made an offer for the farm, at a specified price, but that, if B. chose to have it at that price, C. would decline the purchase in his favour ; B., it was alleged, wrote a note in reply, accepting the offer, but such note was not forthcoming ; on the 11th July A. wrote to B., "I have just received your's ; and am glad you have determined to purchase the W. farm : I will write to C. to inform him you have agreed to purchase the estate ;"—Sir *William Grant*, relying on the words "determine" and "agree," as denoting an acceptance by B. of a previous proposal by A., instead of, as might have been the case, an independent offer by B., considered that the letter of the 11th was sufficiently connected with the note of the 5th, to show that A. agreed to sell upon the terms of that note ; and specific performance was decreed accordingly.

So, upon a sale of goods, a subsequent letter written by the purchaser, and containing the following expressions, "The tobacco I want immediately forwarded ; I likewise want the invoice of the rice and other tobacco," was held to be sufficiently connected with the previous entries of sale of the articles in the vendor's order book (*w*).

(*t*) *Sweet v. Lee*, 3 Man. & Gr. 452. B. 187.

(*u*) *Vide infra*, Ch. XVII.

(*w*) *Allen v. Bennet*, 3 Taunt. 169 ;

(*v*) *Western v. Russell*, 3 Ves. & and see, as to connecting one letter

Chapter VI.

Tests of
sufficiency
in cases of
correspond-
ence.

It must
contain a
clear acces-
sion by both
parties to
the same
terms.

Effect of
conditional
acceptance.

Offer may
be with-
drawn
before
acceptance.

In cases of correspondence the difficulty generally is, to determine whether there has been a concluded agreement or merely a treaty; as to which the following rule seems deducible from the authorities.

If the original offer be met by a simple acceptance, the treaty is, of course, concluded; if the reply be either more or less than a simple acceptance, the variation must be acceded to by the original proposer; or there is no agreement: and this state of things will continue, until there is, upon the face of the correspondence, "a clear accession on both sides to one and the same set of terms (*x*)."

In a late case, where the Defendant wrote at the foot of an agreement for an under-lease, "I have no objection to this agreement, supposing that there is nothing unusual in Sir R.'s (the ground Landlord) leases, which I presume there is not;" and then, before the agreement with this variation had been acceded to by the other party, withdrew his offer; and it was contended that, inasmuch as the covenants were usual, he still remained bound; Sir *J. Wigram*, V. C., admitting that a case might exist in which the distinction between the original and altered agreement, must be treated as plainly nugatory, held, that the case before him could not be considered as of that character, merely because the Court might, upon argument, decide that the covenants were not unusual (*y*).

For, it may be observed, that an original offer, or, it is conceived, any subsequent proposal, which does not amount to a simple acceptance of the terms of the other party, may be withdrawn at any time before it is accepted;

with another, although there is no express reference, *Greene v. Cramer*, 2 Con. & L. 54; *Skimmer v. M'Donall*, 2 De G. & S. 265.

(*x*) 1 Coll. 312; and see, as to an immaterial addition to an acceptance,

Clive v. Beaumont, 1 De G. & S. 397; *Gibbins v. North East Metropolitan Asylum District*, 11 Beav. 1.
(*y*) *Lucas v. James*, 7 Ha. 410;
see cases referred to in last note.

even although a time be named for its acceptance (*z*) : and that if rejected, either by an express refusal, whether written or verbal (*a*), or a proposed variation either as to time for giving possession, or price, or, it is conceived, in any other particular, it at once ceases to be binding (*b*) ; and the acceptance of an offer must be given within a reasonable time (*c*) ; if, however, a person make an offer by post, he cannot retract it, if the other party, before receiving any notice of withdrawal, return an immediate acceptance (*d*).

A writing which is signed by either party, and is perfect as respects the terms of the contract, will not be considered otherwise than final from the mere fact of its having, with the consent of the other party, been sent to a solicitor as instructions for the preparation of a more formal instrument (*e*).

(4.) *As to the signature.*

It has been long settled that a party signing an agreement is *primâ facie* bound by it, although it be not signed by the other party (*f*) : but if only one be bound, he may, it would appear, require the other to signify in writing his assent to or dissent from the contract ; and, unless this be acceded to, he may himself rescind it (*g*).

Chapter VI.

If rejected, &c., ceases to be binding.

Must be accepted within reasonable time.

Offer by letter binding, if accepted by return of post.

Agreement binding, although sent as instructions to a solicitor.

Signature by party charged, sufficient.

But party bound may require other party to elect.

(*z*) *Routledge v. Grant*, 4 Bing. 553 ; *Martin v. Mitchell*, 2 Jac. & W. 428 ; *Lucas v. James*, 7 Ha. 410.

(*a*) *Sheffield Canal Company v. Sheffield and Rotheram Railway Company*, 3 Rail. Ca. 121, R.

(*b*) *Routledge v. Grant*, 4 Bing. 553 ; *Hyde v. Wrench*, 3 Beav. 334 ; *Thornbury v. Bevill*, 1 Y. & C. C. C. 554.

(*c*) *Kennedy v. Lee*, 3 Mer. 454 ; *Thornbury v. Bevill*, 1 Y. & C. C. C.

554, 563.

(*d*) See *Dunlop v. Higgins*, 1 H. of L. Ca. 400 ; *Potter v. Sanders*, 6 Ha. 1.

(*e*) *Fowle v. Freeman*, 9 Ves. 354 ; see *Gibbins v. N. E. Metropolitan Destitution Asylum*, 11 Beav. 1.

(*f*) Sug. 112 ; *Laythoarp v. Bryant*, 2 Bing. N. C. 735 ; *Fowle v. Freeman*, 9 Ves. 354 ; *Owen v. Thomas*, 3 Myl. & K. 353 ; *infra*, Ch. XVIII.

(*g*) 2 Jac. & W. 428.

Chapter VI.

What
signature
sufficient.

A signature printed, or stamped, instead of written, or by initials, may be binding (*h*); but a mere description, although it satisfactorily identify the party, *e. g.*, "your affectionate mother," subscribed to a letter addressed to the son with his name and address in full, has been held insufficient (*i*).

In pencil.

And it appears that an agreement is not the less binding by reason of the alterations and signature being in pencil instead of ink (*k*).

By married
woman in
surname of
deceased
husband.

The Ecclesiastical Courts have held a signature to a will by a woman, twice married and then under coverture, in the name of her first husband, sufficient (*l*).

Signature
by agent
sufficient if
agency
proved.
Agent is a
competent
witness.

And a signature in the name of an agent will bind the principal if the agency be established (*m*): and the alleged agent may be examined either to prove or disprove the agency; but if his evidence go to impeach the validity of the authority under which he has professed to act, it will be received with the most anxious jealousy (*n*).

Signature
not neces-
sarily placed
at end of
agreement.

The signature to formal agreements is, of course, usually found at the end of the document; it may, however, as in the case of a letter or agreement in the third person, be inserted in the beginning or any other part of the instrument, if inserted so as, in effect, to authenticate the entire document, and not to be exclusively applicable to particular purposes (*o*): and this, according to some authorities, although, in the case of an agreement in the third

Effect of
leaving
blank for
signature.

(*h*) *Saunderson v. Jackson*, 2 Bos. & P. 238; *Schneider v. Norris*, 2 Mau. & S. 286; *Phillimore v. Barry*, 1 Camp. Ca. 513; *Sweet v. Lee*, 3 Man. & Gr. 452; and see *Blore v. Sutton*, 3 Mer. 245.

(*i*) *Selby v. Selby*, 3 Mer. 2.

(*k*) *Lucas v. James*, 7 Ha. 410.

(*l*) *In the goods of S. Glover*, 11 Jur. 1022.

(*m*) *White v. Proctor*, 4 Taunt.

209; *Kenworthy v. Schofield*, 2 Barn. & Cr. 945.

(*n*) *Howard v. Braithwaite*, 1 Ves. & B. 202, 209.

(*o*) *Saunderson v. Jackson*, 2 Bos. & P. 238; Sug. 127; *Western v. Russell*, 3 Ves. & B. 187; *Propert v. Parker*, 1 Russ. & M. 625; *Bleakley v. Smith*, 11 Sim. 150; *Lobb v. Stanley*, 5 Ad. & El. N. S. 574; *Stokes v. Moore*, 1 Cox. 219.

person, a place be left for signature at the bottom, in the usual way (*p*) : however, in a recent case, where the agreement contained the names of the parties in the commencement, and concluded with the words, "as witness our hands," without being followed by any name or signature, the Court took a more common-sense view of the question, and held that there was no sufficient signature (*q*) : so, the purchaser's signature, in a column left blank for that purpose in the printed particulars, may be sufficient (*r*).

Party bound
by signature
as witness :

And although a principal or his agent sign merely as a witness, he may be bound, if the signature amount to an acknowledgment of the existence of the agreement ; *e. g.*, "witness A. B." (*s*) : but where a person, whose formal signature would have bound the vendor, merely attested the execution of the agreement by the purchaser, this was held to be insufficient (*t*).

but not as
attesting
witness.

The written approval by a professional agent, of a draft agreement, or of the draft conveyance which recites the agreement, will, it would seem, be insufficient (*u*) ; this, however, was much questioned in a recent case (*v*), which was eventually decided on a collateral point : the effect of a similar approval of a draft agreement by one of the parties, is more doubtful (*w*) ; the circumstance of the party signing such approval being in the legal profession would, it is conceived, be unfavourable to the sufficiency of the signature ; the alteration of the draft conveyance by one of the parties has been held insufficient : about which,

Approval of
draft agree-
ment or
conveyance,
whether
sufficient.

(*p*) *Saunderson v. Jackson*, 2 Bos. & P. 239.

(*q*) *Hubert v. Treherne*, 3 Man. & Gr. 743 ; *Hubert v. Turner*, 4 Sc. N. R. 486.

(*r*) *Emmerson v. Heelis*, 2 Taunt. 38.

(*s*) 9 Ves. 234, 251.

(*t*) *Gosbell v. Archer*, 2 Ad. & El. 500.

(*u*) See Sug. 128.

(*v*) *Thornbury v. Beville*, 1 Y. & C. C. C. 554.

(*w*) See Sug. 129 ; *Doe v. Pedgriph*, 4 Car. & P. 312 ; *Parker v. Smith*, 1 Coll. 608.

Chapter VI. upon the case (*y*) as reported, there could scarcely have been a doubt; as it does not appear that the alterations comprised the name of the party making them: in the case of *Ithel v. Potter* (*z*), a similar decision was come to where the entire conveyance had been written by the Defendant; but it does not appear whether the conveyance recited the agreement, although such, probably, was the case: in a case where the draft of a lease had, in pursuance of a parol agreement, been forwarded to the intended lessee for perusal, and he indorsed and signed a memorandum upon it, requesting the lessee to endeavour to relet the premises, as it would be inconvenient for him (the lessee) to perform his agreement, this was held to be sufficient (*a*).

Signature
by public
companies,
&c.

A contract by a Corporation aggregate, should, as a general rule, be under their common seal (*b*); but, by the Companies Clauses Consolidation Act, 1845, any contract entered into on behalf of a Company coming within the provisions of the Act, and which, if made between private persons, would require to be in writing, and to be signed by the parties to be charged therewith, may be made, varied, or discharged in writing, signed by any two of the Directors (*c*).

Party alter-
ing agree-
ment loses
his rights
thereunder.

We may here observe, that any alteration made by either party in a material part of a written contract, without the consent of the other party, destroys the rights under the contract of the party making the alteration (*d*).

(*y*) *Hawkins v. Holmes*, 1 P. Wms. 770; and see *Stokes v. Moore*, 1 Cox, 219. *Charlton*, 6 Mee. & W. 815; *Cope v. Thames Haven Company*, 3 Exch. 841; 6 Rail. Ca. 83.

(*z*) 1 P. Wms. 771.

(*c*) 8 Vict. c. 16, s. 97.

(*a*) *Shippey v. Derrison*, 5 Esp. Ca. 190.

(*d*) *Powell v. Divett*, 15 East, 29; *Mollett v. Wackerbarth*, 5 C. B.

(*b*) See *Corporation of Ludlow v.* 181.

(5.) *As to the stamps.*As to
stamps on
agreements.

The agreement, if under seal, is a deed, and chargeable with duty as such (*d*) ; if not under seal, and if the subject-matter be of less value than 20*l.*, no duty is payable ; and if, on a sale by auction, the same person buy several lots, a distinct contract arises for each lot ; and, whatever may be the aggregate amount, no stamp is required for any lot which separately sells for less than 20*l.* (*e*) : if the purchase-money exceed 20*l.*, and the agreement contain less than 1081 words, a 2*s.* 6*d.* stamp only is payable (*f*) ; this may, without payment of a penalty, be affixed within fourteen days after execution ; after that time a 10*l.* penalty becomes payable (*g*) : where a series of letters or other documents constitutes an agreement, and contains altogether less than 1081 words, the 2*s.* 6*d.* stamp would seem to attach upon only one of them (*h*) ; an agreement containing more than 1080 words, is, as respects the time for stamping, subject to the same provisions and regulations as a deed (*i*) ; and, prior to the 10th October, 1850, was liable to a 35*s.* stamp, and (if it exceeded 2159 words) to 25*s.* followers ; but under the late Act, a 2*s.* 6*d.* stamp only is payable for the first 1080 words, with 2*s.* 6*d.* followers : if, however, an agreement consist of a series of letters, no progressive duty attaches (*j*), although the letters were written, not by the

(*d*) See *Robinson v. Drybrough*, 6 Durn. & E. 317.

(*e*) *Emmerson v. Heelis*, 2 Taunt. 38 ; *Roots v. Lord Dormer*, 4 B. & Ad. 77.

(*f*) 7 Vict. c. 21 ; 13 & 14 Vict. c. 97.

(*g*) See 7 Vict. c. 21, s. 5 ; and this does not seem to be affected by the new Act ; see proviso to sect. 12.

(*h*) See 55 Geo. III. c. 184, sched. "Agreement ;" and *Parkins v. Moravia*, 1 Car. & P. 376 ; *Peate v. Dicken*, 1 Cr. M. & R. 422 ; and see Tilsley on the Stamp Laws, 43, 1st edit.

(*i*) See 55 Geo. III. c. 184, s. 9.

(*j*) See schedule to 55 Geo. III. c. 184, title "Agreement." The

Chapter VI.

contracting party himself, but by his agent (*k*) : a contract by the assignees of a bankrupt for the sale of his real estate, is exempt from stamp duty (*l*) ; as, also, are agreements under the Acts for promoting the residence of the Parochial Clergy, the Churchbuilding, Poor Law, Tithe Commutation, and Commons Inclosure Acts, and agreements entered into by the Commissioners of Woods and Forests (*m*).

Several stamps, when requisite.

There must, in general, be distinct stamps for each distinct agreement or contract ; upon this principle, where a person purchases several lots at an auction, the agreement must bear a stamp in respect of each lot for which the purchase-money exceeds 20*l*. (*n*) : upon a purchase from persons having separate interests in an estate, (*e. g.*, tenants in common, or tenant for life and remainderman,) the agreement, if so worded as to be a contract for the entire estate, would seem to be subject only to single duty ; but if, on the contrary, it were so worded as to amount to separate contracts with the several vendors for their separate interests in the property, so as to give to each vendor a right to enforce the agreement in respect of his own particular interest, it is conceived that separate stamps would be requisite.

Loss of unstamped agreement, effect of.

If the agreement be not stamped, and be subsequently lost, or even destroyed by the fraudulent act of the party chargeable thereon, a Court of Equity can give no relief unless the Plaintiff can procure a copy and get it stamped

new Act declares, retrospectively and prospectively, that progressive duty is not payable in respect of stamped instruments being incorporated with or referred to in the principal instrument ; see sect. 11 : and see *Sneezum v. Marshall*, 7 Mee. & W. 417.

(*k*) *Grant v. Maddox*, 15 Mee. & W. 737.

(*l*) *Flather v. Stubbs*, 6 Jur. 102 ; see 6 Geo. IV. c. 16, s. 98 ; and 12 & 13 Vict. c. 106, s. 138.

(*m*) See Tilsley on Stamps, 759 to 762, 1st edit.

(*n*) See *James v. Shore*, 1 Stark. 426 ; *Walling v. Horwood*, 12 Jur. 48.

at the Stamp Office; the Defendant, if he have a copy, will be ordered to produce it for that purpose (*o*); and it appears, that a copy may be made from recollection, if the witnesses can swear to the precise terms, and not merely the general tenor, of the instrument (*p*): and the Court will, in the absence of circumstances inducing a supposition to the contrary, presume that a lost instrument was duly stamped (*q*); or that obliterated stamps were of the right amount (*r*).

It has been held by the Court of Exchequer, that any instrument operating as a record of the transfer of property, (not being goods, wares, or merchandise,) *e. g.*, a memorandum that A. *has sold* all the goods and *fixtures* in a certain shop, is a conveyance within the meaning of the Stamp Laws, and must bear the *ad valorem* duty (*s*).

Instrument recording transfer of property is liable to duty as a conveyance.

We may here remark, that an agreement in evasion of the Stamp Laws, *e. g.*, that the document shall, for the present, remain unstamped, but that, if it shall become necessary to stamp it, one of the parties thereto will pay the penalty, cannot be enforced (*t*).

Agreement, in evasion of the stamp laws, void.

(6.) *As to illegal agreements.*

And as a general rule, no agreement can be enforced, at Law or in Equity, which is entered into for an illegal purpose (*u*); and there are certain agreements which the Legislature has pronounced to be, in their own nature, illegal; the Statute of 32 Henry VIII. (*v*), renders it

Agreement, for any illegal purpose, void.

ChamPERTY

(*o*) See *Bousfield v. Godfrey*, 5 Bing. 418; *Blair v. Ormond*, 1 De G. & S. 428.

(*p*) *Smith v. Henley*, 1 Ph. 391.

(*q*) See cases referred to in last two notes, and *Hart v. Hart*, 1 Ha. 1; *Crowther v. Solomons*, 6 C. B. 758.

(*r*) *Doe v. Coombs*, 6 Jur. 930, Q. B.

(*s*) *Horsfall v. Hey*, 2 Exch. 778.

(*t*) *Abbott v. Stratten*, 3 Jo. & Lat. 616.

(*u*) *Vide infra*, Ch. XVII. and XVIII.

(*v*) See sect. 2.

Chapter VI.
and main-
tenance.

unlawful to buy or sell any pretended right or title to any lands or hereditaments, unless the vendors, or their ancestors, or the persons through whom the claim is derived, have been in possession of the property, or of the reversion or remainder thereof, or taken the rents or profits thereof, within a year before the sale ; but the purchase of a pretended title, by a person in lawful possession of the rents and profits, is allowable (*w*) ; in a recent case, where A., possessed of a term of years, died in 1828, and strangers entered and occupied until 1841, when A.'s next of kin took out Letters of Administration and sold and assigned the term, the assignment was held to be clearly void (*x*) ; so, the Act extends to a lease under a pretended title (*y*) ; and to the assignment of the mere right to file a bill to set aside a previous voidable conveyance (*z*) ; but not to an assignment of a purchaser's interest under the agreement for sale (*a*) ; nor to an assignment of the subject-matter of a suit (*b*), unless the purchaser agree to indemnify the vendor against the costs incurred or to be incurred in the suit (*c*) ; nor, even then, if the purchaser have a previous common interest in the event of the suit ; as in the case of a purchase, by a second mortgagee, of the interest of the first mortgagee, during a suit in which the mortgaged property is claimed under a paramount title (*d*) : nor to an agreement to enable the purchaser of an estate to recover for rent due, or injury done to the property, prior to the purchase (*e*) : nor to a conveyance to a reversioner or remainderman, with a view to strengthen his estate (*f*) ;

(*w*) See sect. 4.

(*x*) *Doe d. Williams v. Evans*, 1 C. B. 717.

(*y*) *Hitchins v. Lander*, G. Coop. 34.

(*z*) *Prosser v. Edmonds*, 1 Y. & C. Exch. 481.

(*a*) Sug. 422 ; and see 8 & 9 Vict. c. 106, s. 6.

(*b*) *Harrington v. Long*, 2 Myl. & K. 590 ; see *Martyn v. Macnamara*, 2 Con. & L. 541.

(*c*) *Harrington v. Long*, *ubi supra*.

(*d*) *Hunter v. Daniel*, 4 Ha. 420.

(*e*) Sug. 423 ; *Williams v. Protheroe*, 5 Bing. 309.

(*f*) Co. Litt. 369 *b* ; see *Anson v. Lee*, 4 Sim. 364.

nor to cases where the right purchased is originally clear, but the litigation results from circumstances subsequently arising or subsequently known (*g*).

By the Act of the 7 & 8 Will. III. c. 25, s. 7, it is declared, that all conveyances made of any hereditaments, in order to multiply voices, or to split and divide the interest in any houses or lands among several persons, to enable them to vote at elections of Members to serve in Parliament, are void and of none effect: it appears, however, to be settled by recent decisions, that a conveyance made to carry into effect a real *bonâ fide* contract for sale, where the purchase-money is paid and possession taken without any secret reservation or trust for the benefit of the seller, is not within the Statute; although it be made with a view to the multiplying voices, or the splitting of the freehold; the intention of the Statute being, to avoid such conveyances only, made with that view, as are in themselves fraudulent and collusive (*h*): and the same test of validity must of course be applied to agreements upon which such conveyances are founded.

Splitting
votes for
electioneer-
ing pur-
poses.

(*g*) *Wilson v. Short*, 6 Ha. 366.

Newman, Resp. ibid. 122: Thornily,

(*h*) *Riley, App.; Crossley, Resp.*

App.; Aspland, Resp. ibid. 160.

2 C. B. 146: *Alexander, App.;*

CHAPTER. VII.

AS TO THE EFFECT OF THE CONTRACT ON THE RIGHTS OF
THE PARTIES.

1. *Purchaser entitled to estate, and vendor to purchase-money.*

2. *Purchaser's general rights under contract as against vendor.*

3. *Vendor's general rights under contract as against purchaser.*

4. *Rights of vendor and purchaser, inter se, not affected by death, bankruptcy, &c., of either party.*

5. *Death of vendor before completion,—its effect on relative rights of his real and personal representatives, under old, and under new Law.*

6. *Death of purchaser before completion,—its effects on relative rights of his real and personal representatives, under old, and under new Law.*

7. *Effect of contract in various special cases.*

Purchaser
entitled to
estate, and
vendor to
purchase-
money.

(1.) FROM the time of the owner of an estate having entered into a binding agreement for its sale, he holds the same in trust for the purchaser, subject to payment of the purchase-money; and if the agreement be binding on the purchaser, he, on the other hand, is, as a general rule, under a personal equitable, as well as legal, liability to the vendor for payment of the purchase-money (*a*).

Although
vendor be

And the agreement equally binds the estate, although

(*a*) See *Green v. Smith*, 1 Atk. 572 *Toft v. Stephenson*, 7 Ha. 1.

the vendor be a trustee, or a mere donee of a power of sale, instead of absolute owner.

Chap. VII.

a trustee, or donee of power.

(2.) *As to purchaser's general rights under contract as against vendor.*

It is sometimes stated, in general terms, that by the contract the purchaser becomes, in Equity, the owner of the property: but "this rule applies only as between the parties to the contract, and cannot be extended so as to affect the interests of others. If it could, a contract for the purchase of an equitable estate would be equivalent to a conveyance of it. Before the contract is carried into effect, the purchaser cannot, against a stranger to the contract, enforce equities attaching to the property (*b*):" so, notice of an incumbrance given to the purchaser before the execution of the conveyance, is effectual, although the purchase-money be actually paid (*c*); and the purchaser, although he may then have, or subsequently acquire, the legal estate, can, it is conceived, use it against the incumbrancer only to the extent of securing such purchase-money. His interest under the contract may, however, be charged, or assigned (*d*), and will be bound by a judgment (*e*); but the incumbrancer, assignee, or creditor, can only obtain relief, as against the vendor, on the terms of undertaking all the purchaser's liabilities under the contract (*f*).

General nature of purchaser's equitable ownership; strangers to contract not affected by it.

Is capable of alienation.

Up to the time fixed for completion, the vendor is, in the absence of special stipulation, entitled to the crops, or other ordinary profits of the land; he would not, however, it is conceived, be entitled to take crops in an immature

Vendor entitled to profits, until time fixed for completion.

(*b*) *Per* Lord Cottenham, in *Tas-ker v. Small*, 3 M. & C. 70.

(*c*) *Wigg v. Wigg*, 3 Atk. 384.

(*d*) *Seton v. Slade*, 7 Ves. 274.

(*e*) *Baldwin v. Belcher*, 1 J. & L. 18.

(*f*) *Dyer v. Pulteney*, Barn. Ch. R. 160.

Chap. VII.

Whether he may take crops after time fixed for, but pending completion.

Windfalls, &c., belong to purchaser from date of contract.

Material alteration of property by vendor avoids the contract; *e.g.*, a fall of ornamental timber.

Purchaser takes accidental benefits, and bears accidental losses, as in cases of Death of tenant for life:

or of *cestui que vie*:

state, or otherwise than in due course of husbandry. After the time fixed for completion, and pending negotiation, he may, it appears, in due course of husbandry, cut coppice and get in crops, but the net profits will belong to the purchaser (*g*).

Everything, however, which forms part of the inheritance belongs to the purchaser from the date of the contract; so that he is entitled to windfalls (*h*), and to the produce of ordinary timber cut (*i*), or, it is conceived, stone or gravel quarried or dug by the vendor after the contract (*j*).

And any act by the vendor, which prevents his giving to the purchaser that which was, substantially, the subject-matter of the contract, renders the agreement voidable by the latter; *e.g.*, the felling of ornamental timber (*k*); and, even as to ordinary timber, the authorities merely show that the fall of it *may* be matter for compensation; cases might, it is conceived, occur, in which the Court would relieve a purchaser on account of falls of wood, although neither planted nor left for ornament or shelter.

And since, as between the parties to the contract, the purchaser is owner of the estate, he has the benefit of any improvements to the property which may happen after the date of the contract; *e.g.*, the dropping of lives on the purchase of a reversionary interest (*l*), or a sudden rise in the value of land from its being required for a public purpose (*m*): and must bear any loss which occurs without the fault of the vendor; *e.g.* the death of the *cestui que vie*, on the purchase of an estate for life, or a life

(*g*) *Poole v. Shergold*, 1 Cox, 273; Sug. 819; see, as to manorial fines, on purchase of a manor, *Garrick v. Lord Camden*, 2 Cox, 231 (stated *infra*, Ch. XIX.); and *Earl of Hardwicke v. Sandys*, 12 Mee. & W. 761.

(*h*) *Poole v. Shergold*, *ubi supra*.

(*i*) *Magennis v. Fallon*, 2 Moll. 591.

(*j*) See *Nelson v. Bridges*, 2 Beav. 239.

(*k*) *Magennis v. Fallon*, *ubi supra*.

(*l*) 1 Madd. 539.

(*m*) 6 Ves. 352.

annuity (*n*); or the destruction of house property by fire (*o*); and, as respects fire, the vendor, unless he agree that the property shall be kept insured, or, it would seem, make some proposition to the purchaser grounded upon the fact of its being insured, is not bound to keep up the insurance, or to give the purchaser notice of its having dropped (*p*): so, also, the purchaser of house property must make good any injury done to adjoining premises by the fall of the buildings subsequently to the contract (*q*).

Chap. VII.
or fire.

Vendor,
whether
bound to
insure.

And where the accruing benefit is such, that, if taken by the purchaser, it would or might be irrevocably lost to the vendor, (as in the case of a vacancy occurring, pending discussions on the title to an advowson,) the purchaser claiming the benefit must accept the title (*r*): in *Wyvill v. Bishop of Exeter* (*s*), the right to present was altogether denied him, on the ground of his objections to the title having been frivolous; but the case seems of doubtful authority (*t*).

Restrictions
on purchas-
er's right,—
case of
vacancy on
sale of
advowson.

So, in the converse case of an estate being sold in consideration of a life annuity, and of the *cestui que vie* dying before completion, the purchaser will be entitled to a conveyance on payment of the arrears (*u*); it is, however, as a general rule, essential, in such a case, that he should, in the lifetime of the *cestui que vie*, have made, or tendered, any payment which became due during such lifetime (*v*); the rule, however, it is presumed, would not apply, unless a sufficient interval had elapsed between the payment becoming due and the death, to allow of payment or tender

Estate sold
in consid-
eration of
life annuity;
—purchaser
is entitled to,
on death of
cestui que vie
before con-
veyance;—
subject to
what re-
strictions.

(*n*) Sug. 330; and see 6 Ves. 352.

(*s*) 1 Pri. 292.

(*t*) Sug. 332.

(*o*) *Paine v. Meller*, 6 Ves. 349.

(*u*) *Mortimer v. Capper*, 1 Bro. C. C. 156.

(*p*) 6 Ves. 353.

(*q*) *Skelton v. Robertson*, 14 Jur. 323.

(*v*) *Jackson v. Lever*, 3 Bro. C. C. 605; *Pope v. Roots*, 1 Bro. P. C. 370.

(*r*) Sug. 332.

Chap. VII.

being made according to the usual course of business : the omission, in fact, must amount to *laches* (*w*) : nor, on the other hand, where a payment had been previously refused or long neglected, is it likely that a Court of Equity would be satisfied with payment or tender made at a time when the *cestui que vie* was, to the knowledge of the purchaser, dying or dangerously ill : it was laid down, in a recent case (*x*), that although the Court, upon sales of property in consideration of an annuity, will enforce specific performance notwithstanding the death of the annuitant, it will inquire with some jealousy into the fairness of the transaction, and will require a clear case for specific performance under such circumstances.

Sales by
Court.

We shall hereafter have occasion to consider the above rules, with reference to sales under a decree of the Court of Chancery (*y*).

Contract by
public com-
pany under
usual com-
pulsory
power, does
not exhaust
the power.

Where a Public Company, under the usual compulsory power, contracts for the purchase of part only of the land subject to the power, this will not prevent their subsequently exercising it in respect of the residue (*z*).

(3.) *As to vendor's general rights under contract
as against purchaser.*

Vendor's
lien on
estate.

The vendor has a lien upon the estate for the unpaid purchase-money (*a*) ; if therefore, before payment, the purchaser be in possession, equity will restrain him from any act,—such as felling timber,—by which the vendor's security might be depreciated (*b*) ; if, however, only an

He may
restrain a
fall of
timber by

(*w*) See Sug. 336.

(*x*) *Davies v. Cooper*, 5 M. & C. see p. 279.

(*y*) *Infra*, Ch. XIX.

(*z*) *Simpson v. Lancaster and Carlisle Railway Company*, 15 Sim. 580 ; *Stamps v. Birmingham and*

Stour Valley Railway Company, 2 Ph. 673 ; 6 Rail. Ca. 123.

(*a*) As to which, *vide infra*, Ch. XIV.

(*b*) *Crockford v. Alexander*, 15 Ves. 138.

inconsiderable part of the purchase-money remain unpaid, it may be conjectured that the vendor, applying for the injunction, would, as would an ordinary mortgagee, have to satisfy the Court of the estate without the timber being an insufficient security (*c*): and it is also presumed that the injunction might be so extended as to restrain the cutting of underwood out of the due course of husbandry (*d*), or any other similarly prejudicial act.

A judgment entered up against the vendor subsequently to the contract, and registered, is a lien upon the unpaid purchase-money (*e*).

If the purchaser die, intestate and without an heir, before conveyance, it seems probable that the vendor might keep the estate and any part or the whole of the purchase-money, if paid (*f*).

Where the purchase is by a tenant, either from year to year or for a longer term, the contract will not determine the tenancy, unless specially worded so as to be an absolute contract for purchase whether the vendor do or do not show a good title (*g*): but equity will restrain the landlord from enforcing payment of rent pending completion (*h*).

A mere tenancy at will appears to be determined by the contract (*i*).

It has been recently determined, that a purchaser who has been let into possession, pending discussions as to title, cannot, if the contract go off through defects in title, be sued for use and occupation; even although the occupation may have been a beneficial one (*j*): nor can

Chap. VII.
purchaser in
possession.
Under what
circum-
stances.

Judgment
is a lien on
unpaid pur-
chase-
money.

Vendor's
rights, on
death of
purchaser
without real
representa-
tive before
completion.

Tenancy of
purchaser,
whether
determined
by contract.

Tenancy at
will deter-
mined.

Purchaser
in posses-
sion, not
liable for
use and oc-
cupation, if
no title.

(*c*) See *Humphreys v. Harrison*, 1 Jac. & W. 581; *Hippesley v. Spencer*, 5 Madd. 421; *King v. Smith*, 2 Ha. 239.

(*d*) *Humphreys v. Harrison*, *ubi supra*.

(*e*) *Prid. on Judgments*, 21.

(*f*) See Sug. 337.

(*g*) *Doe v. Stanion*, 1 Mee. & W. 695.

(*h*) *Daniels v. Davison*, 16 Ves. 253.

(*i*) Sug. 193.

(*j*) *Winterbottom v. Ingham*, 7 Q.

Chap. VII.

he, unless he agreed to quit on some specified event which has happened (*k*), be ejected without notice (*l*): the above questions should, of course, be provided for by special agreement where the purchaser is let into possession before payment, or where the purchase is by a tenant: when the purchase is completed, the purchaser's title, even at Law, so far relates back to the time fixed for completion, that he can maintain use and occupation against a person whom he has by mistake allowed to have the interim possession (*m*).

(4.) *Rights of vendor and purchaser, inter se, not affected by death, bankruptcy, &c. of either party.*

Contract not avoided by death, bankruptcy, or insolvency.

The contract, when once entered into, will not be avoided by the death, bankruptcy, insolvency, or lunacy (*n*), of both or either of the parties, even before the time fixed for completion.

Upon the bankruptcy of a purchaser, the vendor may require the assignees to elect whether they will abandon or perform the contract; and, if they fail so to do, may apply by petition for delivery up of the agreement and possession of the premises (*o*): and if, in any case, they allow a reasonable time to elapse without requiring the contract to be performed, they will be considered to have abandoned it (*p*); and the question, what is a reasonable

B. 611; and see *Kirtland v. Pounsett*, 2 Taunt. 145, where the Court seemed to attach importance to the fact of the purchaser having paid part of the purchase-money; see p. 147; but this, although it was also the case in *Winterbottom v. Ingham*, does not seem to have been there considered material.

(*k*) *Doe v. Sayer*, 3 Camp. 8.

(*l*) See 1 Mee. & W. 700; *Right v. Beard*, 13 East, 210.

(*m*) *Hull v. Vaughan*, 6 Pri. 157; and see 7 Q. B. 617.

(*n*) *Winged v. Lefebury*, 2 Eq. Ca. Ab. 32; *Orlebar v. Fletcher*, 1 P. Wms. 737; *Owen v. Davies*, 1 Ves. 82; *Brooke v. Hewitt*, 3 Ves. 255; Sug. 191, 192, 233; *vide infra*, Ch. XVIII.

(*o*) 6 Geo. IV. c. 16, s. 76; 12 & 13 Vict. c. 106, ss. 145, 146.

(*p*) *Lawrence v. Knowles*, 7 Sc. 381.

time, will, in an action at Law, be left to the jury (*p*) : or the vendor may petition for a resale of the property, and for payment of the amount remaining due to him, and for leave to prove for the deficiency (*q*) (if any) ; and he will be entitled to his costs, although there be no written contract, but only part performance of a parol agreement (*r*).

Chap. VII.

(5.) *Death of vendor before completion : its effect on relative rights of his real and personal representatives, under old, and under new Law.*

Upon the vendor's death, the unpaid purchase-money forms part of his personal estate (*s*) ; the profits of the land from his death up to the time fixed for completion belong to his real representatives (*t*).

Purchase-moneys go to personal, and interim profits to real representative.

If he die before conveyance, the legal estate, of course, descends on his heir or devisee ; if he die without an heir, and intestate, a conveyance of the legal estate may be obtained under the provisions of the Trustee Act, 1850 (*u*).

Legal estate descends to heir or devisee :—conveyance of, under Statute, if no real representative.

In cases governed by the old law, as it existed before the passing of the new Wills Act (*v*), (and which, it must be remembered, is still binding in all cases where the will has not been made or re-published, &c., on or since the 1st of January, 1838,) the contract for sale, (assuming it to be binding as against the vendor,) is, in equity, a revocation of a prior devise of the property ; the legal estate passes to

Under old law, contract revoked prior devise in equity.

(*p*) *S. C.*

mining licence was purchase-money or rent.

(*q*) *Bowles v. Rogers*, 6 Ves. 95,

(*t*) *Lumsden v. Fraser*, 12 Sim.

n.

263.

(*r*) *Ex parte Cooper*, 3 Mon. D. & De G. 717.

(*u*) 13 & 14 Vict. c. 60 ; or, formerly,

(*s*) Sug. 192 ; see *Lord Hatherton v. Bradburne*, 7 Jur. 1100 ; 13 Sim.

23 ; see *Re Lowe's estate*, 2 Ph. 690.

599 : where the question was whether the consideration payable for a

(*c*) 1 Vict. c. 26.

Chap. VII.

Although
devise was
in trust to
sell.

Relative
rights of
vendor's
real and
personal
representa-
tives, de-
pendent on
his liability
to perform
the contract.

Notice by
railway
company
acquiesced
in, whether
equivalent
to contract
by owner.

the devisee, but merely as a trustee; and the purchase-money belongs to the personal estate. And even if the estate be devised in trust for sale, and then be agreed to be sold by the testator, the purchase-money will not belong to the legatees of the proceeds of sale (*w*).

In such cases, the question between the real and personal representatives seems to be this, viz., whether the vendor at the time of his death was, either absolutely or contingently, under such an agreement as Equity would enforce against him (*x*): if so, the property, (as between his real and personal representatives,) forms part of his personal estate from the time fixed for completion; whether such time be specified in the contract, or have to be determined by the occurrence of some collateral event, or depend upon the mere option of the purchaser (*y*); but, unless and until such event occur or such option be declared, the estate (in the case of intestacy) belongs to the heir (*z*), or, in the case of a devise, (either after (*a*), or, it is conceived, before the contract,) to the devisee, unless the contract evidence a contrary intention; which intention is not evidenced by a special reservation of the rent and profits, until completion, in favour of the vendor, his *heirs, executors, and administrators* (*b*).

And it has been held that when a railway or other public company, in exercise of its compulsory power, gives due notice of its intention to take land, mere acquiescence by the purchaser in such notice, will, (unless he be *non compos*, or under some other personal disability) (*c*), be con-

(*w*) *Arnald v. Arnald*, 1 Bro. C. C. 401; *Newbold v. Roadknight*,

(*z*) *Townley v. Bedwell*, 14 Ves. 591.

1 Russ. & M. 677.

(*a*) Sug. 204.

(*r*) See *Knollys v. Alcock*, 7 Ves. 558; Sug. 213.

(*b*) *Shadforth v. Temple*, 10 Sim. 184.

(*y*) *Lawes v. Bennet*, cited 14 Ves. 596.

(*c*) *Midland Counties Railway v. Oswin*, 1 Coll. 74, 80.

sidered equivalent to a contract; and the purchase-money will belong to his personal representatives (*d*): but this appears to be open to doubt (*e*).

If, at the vendor's death, there be a binding contract as against the purchaser, but no binding contract have been entered into by the vendor, the rights of his heir or devisee are, of course, unaffected.

If the contract were binding upon both parties at the time of the vendor's death, no subsequent act or matter can alter the relative rights of his representatives (*f*): so that, if the purchaser subsequently act so as to lose his right under the contract, the estate belongs in Equity to the next-of-kin of the vendor (*g*).

If the contract (originally binding) be rescinded or abandoned by both parties in the lifetime of the vendor, there seems to be ground to contend that the rights of the devisee are restored (*h*); if, however, it were held that the devisee could not take, the heir would be entitled beneficially.

If, during the vendor's lifetime, the purchaser alone abandon the contract, or act so as to relieve the vendor from his liability to convey the estate, it seems that the property would be considered real estate at his decease (*i*); but unless the vendor have acquiesced in the vacation of the contract, there would seem to be a difficulty in maintaining the rights of the devisee against the heir; except in cases coming within the new law.

If, during the vendor's lifetime, he himself abandon the contract, or if, through want of title or for any other

Rights of vendor's representatives, unaffected by a contract binding only on the purchaser.

If contract binding on both parties at vendor's death, relative rights of his representatives are unaltered by subsequent events.

Whether, if contract is mutually rescinded before death, devisee's rights are restored.

Effect of its ceasing, during vendor's life, or to be binding on himself:

or upon the purchaser.

(*d*) *Ex parte Hawkins*, 13 Sim. 569; and see *Richards v. Alt.-Gen. of Jamaica*, 13 Jur. 197.

(*e*) See *Adams v. Blackwall Railway Company*, 14 Jur. 679, C.

(*f*) *Bennet v. Lord Tankerville*, 19 Ves. 179; and see *Tebbot v.*

Voules, 6 Sim. 40.

(*g*) *Curre v. Bowyer*, 5 Beav. 6.

(*h*) Sug. 202; but the point is doubtful, see 7 Ves. 558; 19 Ves. 179.

(*i*) Sug. 213; 1 Jarm. on Wills, 49.

Chap. VII. reason, the contract, at the time of his death, be capable of being enforced only *against* and not *by* him, the right of the personal representatives would seem to depend upon whether the purchaser do or do not choose to enforce specific performance (*j*) ; the case being, in effect, similar to those in which the purchaser has, *ab initio*, a mere option to purchase.

Effect of general devise upon real estate contracted to be sold ;—devisee takes merely as trustee.

A general devise, of all his real estates, by the vendor, after the contract, will, *primâ facie*, and in the absence of any limitations or other matter inconsistent with such an intention, pass the legal estate in the property contracted to be sold (*k*) ; but, although the estate be devised expressly by name, the devisee, as a general rule, takes merely as a trustee for the purchaser, and the purchase-money forms part of the personal estate (*l*).

Specific devisee, when beneficially entitled.

But in a late case, where a testator devised, by *special description*, lands subject to a mere option of purchase, to A. for life with remainder over, it was held that the purchase-money was subject to the same limitations as had been declared of the lands (*m*).

Effect of 1 Vict. c. 26, on relative rights of vendor's representatives.

And the law, as above stated, appears to be unaltered by the 1 Vict. c. 26 (*n*) ; which, however, removes all doubt as to the devisee's right in cases where the contract is rescinded or abandoned by the vendor, or is not binding on him ; and also is in favour of the devisee's beneficial interest in cases similar to *Knollys v. Shepherd* (*o*).

(*j*) See 1 Jarm. on Wills. 50.

(*k*) *Wall v. Bright*, 1 Jac. & W. 494.

(*l*) *Knollys v. Shepherd*, 1 Jac. & W. 499, cited.

(*m*) *Drant v. Vause*, 1 Y. & C. C. C. 580 ; see judgment.

(*n*) *Farrar v. Lord Winterton*, 5 Beav. 1 ; *Moor v. Raisbeck*, 12 Sim. 123 ; *Midland Counties Railway Company v. Oswin*, 1 Coll. 74, 80 ; *Ex parte Hawkins*, 13 Sim. 569.

(*o*) *Ubi supra* ; see Sug. 211.

(6.) *Death of purchaser before completion; its effect on relative rights of his real and personal representatives, under old, and under new Law.*

Upon the death of the purchaser before completion, the property contracted for, (assuming it to be freehold or copyhold of inheritance,) descends to his real representative, who is *primâ facie* entitled to have the purchase-money paid out of the personal estate (*p*).

Death of purchaser before completion.

Here also, the question between the purchaser's real and personal representatives is this, viz.: whether at the time of his decease, he was, either absolutely or conditionally, under a binding contract to purchase; if absolutely bound, or if conditionally or optionally bound, and the condition upon which the liability was to become absolute be subsequently fulfilled, or the vendor's option to sell be declared, the real representative is entitled (*q*); and his rights will not be affected by anything subsequent to the death of the purchaser; so that if by such subsequent matter (*e. g.*, the felling of ornamental timber by the vendor), the contract cease to be binding on the purchaser's representatives, his real representative is nevertheless entitled to the purchase-money (*r*).

Relative rights of real and personal representatives depend on his liability to perform contract.

If, however, the contract gave the purchaser a mere option, which he had not declared at the time of his decease, or if, through want of title in the vendor or any act or omission on his part, the agreement, although intended to be binding on both parties, was, at the time of the purchaser's death, binding only upon the vendor; the real representative of the purchaser has no claim upon the personal estate for the unpaid purchase-money, and a bill

If not liable his real representatives had no claim on his personal estate.

(*p*) *Broome v. Monck*, 10 Ves. 597, 611. (*r*) 1 Jarm. on Wills, 46; and see the judgment in *Broome v.*

(*q*) *Buckmaster v. Harrop*, 13 Ves. 456. *Monck*, 10 Ves. 597.

Chap. VII.

filed by him against the personal representatives and the vendor, will be dismissed (*s*) ; but, upon principle, it would seem that, if he chose to pay for the estate out of his own pocket, he might enforce the contract against the vendor.

Relative rights of heir and devisee of the purchaser under old law.

Right of devisee as against heir depended upon contract being binding on vendor.

But will might put him to his election.

Devisee might be entitled to estate, as against vendor and purchaser's heir, and yet not to have purchase-money paid out of personal estate.

The relative rights of the heir and devisee of the purchaser, in cases falling within the old Law, seem to depend on the following rules.

A purchaser, upon entering into a contract for purchase, became entitled to dispose, by will, of his rights under the contract (*t*) : if, however, the contract were not, at the date of the will, binding upon the vendor, (either absolutely, or subject to a condition or option subsequently fulfilled or declared,) the purchaser had *no* enforceable rights, and his will was therefore inoperative ; and any interest subsequently acquired by him in the property descended on his heir (*u*) ; a clear indication, however, of the testator's intention that the devisee should take, either the particular lands, or, generally, all subsequently purchased lands, was sufficient to put the heir to his election between the descended land and any provision made for him by the will (*v*) : if, however, at the date of the will, the contract were binding as against the vendor, the purchaser's devisee became entitled to the benefit of it, (if remaining unperformed at the purchaser's decease ;) but his right to have the purchase-money paid out of the personal estate, depended, as above shown, upon the question whether the contract were binding as against the purchaser at his decease ; and, if this were so, it is conceived that the devisee would, (as against the heir,) be

(*s*) Sug. 213 ; *Green v. Smith*, 1 Atk. 573 ; *Broome v. Monck*, 10 Ves. 597 ; *Collier v. Jenkins*, 1 You. 295.

(*t*) Sug. 194, 195 ; *Broome v. Monck*, *ubi supra* ; *Rose v. Cunyng-*

hame, 11 Ves. 550 ; *Gaskarth v. Lord Lowther*, 12 Ves. 107.

(*u*) *Rose v. Cunyngname*, *ubi supra* ; *Duckle v. Baines*, 8 Sim. 525.

(*v*) *Thellusson v. Woodford*, 13 Ves. 209 ; Sug. 199.

entitled, although the contract were not binding upon the purchaser at the date of the will. If the contract were performed by the vendor in the purchaser's lifetime by a conveyance to him in fee, (or, perhaps, to the common uses to bar dower in his favour, in cases where the contract was for a conveyance to him or such uses as he should appoint (*w*),) the devisee was entitled in equity, and the legal estate descended to the heir as his trustee: a conveyance to uses to bar dower, operated, however, as a revocation where there was either no written agreement (*x*), or an agreement to convey in fee (*y*), or even an agreement to convey to the purchaser, his heirs, *appointees* or assigns (*z*): the doctrine, however, is disapproved of by Sir *E. Sugden* (*a*), and although apparently well settled (*b*), seems open to much observation.

Lands merely contracted for, passed along with lands contracted for and conveyed, under a general devise of all lands purchased by the testator (*c*); and lands recently purchased and conveyed, passed under a general devise of lands contracted for (*d*); and copyholds surrendered to the use of the copyholder's will, passed under a general devise of copyhold estates contained in a prior will and not subsequently republished (*e*).

And, in cases of wills falling within the operation of the late Act, the above questions between the heir and devisee are settled in favour of the latter, by the provision which makes the devise operate upon the testator's interests as they exist at the time of his death.

Chap. VII.

Cases in which conveyance to purchaser revoked devise.

Effect of devise of lands "contracted for" and "purchased."

Will passed copyholds subsequently surrendered to use of will.

Effect of 1 Vict. c. 26, on relative rights of heir and devisee of purchaser.

(*w*) Sug. 198.

(*x*) *Ward v. Moore*, 4 Madd. 368.

(*y*) *Rawlins v. Burgis*, 2 Ves. & B. 382.

(*z*) *Bullin v. Fletcher*, 1 Keen, 369; 2 M. & C. 432.

(*a*) Sug. 198; 2 Dru. & War. 497.

(*b*) "I cannot say I see anything

like a doubt on the authorities."

Per Lord Cottenham, 2 M. & C. 441.

(*c*) *Atcherley v. Vernon*, 10 Mod. 526.

(*d*) *St. John v. Bishop of Winton*, Cowp. 94.

(*e*) Sug. 200.

Chap. VII.

Effect,
under old
law, of
purchase
of fee by
termor ;

Under the old law, upon a binding contract for purchase of the inheritance by a person possessed of a beneficial term for years, the term, although specifically bequeathed by a prior will, became attendant on the inheritance ; so that, on the death of the purchaser, even before conveyance, his legatee of the term was merely a trustee for his heir (*f*) : the intervention, however, of any intermediate estate, unless held in trust for the purchaser (*g*), would seem to prevent the operation of the rule (*h*) : and the rule that the term became attendant was merely one of presumption, which might be rebutted by evidence of a contrary parol declaration by the purchaser (*i*).

and under
1 Vict. c. 26.

It seems probable that, in cases governed by the new law, a contract for purchase, if not completed by conveyance, would, in equity, defeat (as before) the rights of a party claiming the term under a general bequest ; but would not, (except in cases coming within the operation of the 8 & 9 Vict. c. 112,) affect a specific legatee of the term : but even a specific legatee would lose the benefit of the bequest, if the term were actually merged by a conveyance of the fee to the testator, or became attendant on the inheritance, or satisfied and merged under the Merger Act (*j*).

(7.) *As to the effect of contract in various special cases.*

Contract
for sale by
mortgagee
under
power :—
he may yet
sue for
mortgage
debt.

It has been recently held, that the fact of a mortgagee, with power of sale, having contracted to sell part of the mortgaged estate for a sum exceeding the amount due on the security, is no ground for restraining him from bringing an action for recovery of the mortgage debt (*k*).

(*f*) *Galton v. Hancock*, 2 Atk. C. C. 69 ; 9 Ves. 509.
425 ; *Capel v. Girdler*, 9 Ves. 509. (*i*) Sug. 789.

(*g*) *Whitchurch v. Whitchurch*, 2 (*j*) Sug. 209.

P. Wms. 236.

(*k*) *Willes v. Levett*, 1 De G. &

(*h*) *Scott v. Fenhoulet*, 1 Bro. S. 392.

When the assignee of a lease agreed to sell it, and it was stipulated that the purchaser should not be entitled to an assignment, and he entered and retained possession until the end of the term, the latter was held bound, in Equity, to indemnify the original lessee, although no party to the agreement, against breaches of covenant committed during such possession (*l*).

Chap. VII.

Agreement for assignment of lease, and possession taken; purchaser must indemnify original lessee against breaches of covenant.

Where a lessor becomes the equitable assignee of an underlease, he incurs the obligation of performing the covenants therein contained; and cannot set up their non-performance as a ground for refusing performance of a covenant in the original lease (*m*).

Agreement by lessor for purchase of underlease; its effect.

When assignees of a bankrupt contract to sell a lease, this fixes them as assignees of it, although the contract be subsequently abandoned; unless, perhaps, it be shown that it could not have been enforced (*n*).

Agreement for sale by assignees of a bankrupt is an acceptance of a lease.

A contract for sale by a single man, was, in cases subject to the old Law of Dower, sufficient to exclude the claim to dower of a wife whom he married before the conveyance (*o*).

Agreement for sale excluded dower of after-taken wife.

(*l*) *Close v. Wilberforce*, 1 Beav. 112; see *Moore v. Gregg*, 2 Ph. 717, 725.

(*n*) *Hastings v. Wilson*, Holt's N. P. C. 290.

(*m*) *Jenkins v. Portman*, 1 Ke. 435.

(*o*) *Lloyd v. Lloyd*, 2 Con. & L. 592.

AS TO THE ABSTRACT.

1. *General matters relating to the abstract.*
2. *When perfect ;—what it must contain and show.*
3. *What should be furnished, in various specified cases.*
4. *As to its preparation, contents, and delivery.*
5. *As to its examination and perusal.*
6. *As to its verification.*

Purchaser's
right to
abstract.

His right to
retain.

Must be
given up, if
contract
abandoned.

Vendor
pays for.

(1.) A PURCHASER may require to be furnished with an abstract prepared in the usual way (*a*), even although he have agreed to accept the title (*b*) : he may retain it, during negotiations upon, and even after rejection of, the title, until the dispute be finally settled, for the purpose of showing the grounds of such rejection (*c*) ; and, in the interim, he may maintain trover for it, even against the vendor (*d*) : when the contract is finally abandoned by both parties, he must return the abstract, and may not retain any copy of it (*e*) ; counsel's opinion and observations he may, it appears, retain if written upon separate paper (*f*) ; or, if written upon the abstract itself, he may erase them before returning it (*g*).

The vendor, as a general rule, pays for the abstract (*h*) ;

- | | |
|--|--|
| (<i>a</i>) <i>Horne v. Wingfield</i> , 3 Sc. N. R. 340 ; Sug. 431. | (<i>e</i>) 2 Taunt. 277. |
| (<i>b</i>) <i>Morris v. Kearsley</i> , 2 Y. & C. 447. | (<i>f</i>) 2 Taunt. 270 ; but see Sug. 447. |
| (<i>c</i>) 2 Taunt. 278 ; Sug. 447. | (<i>g</i>) <i>Wood v. Court</i> , 2 S. Atk. Conv. 463. |
| (<i>d</i>) <i>Roberts v. Wyatt</i> , 2 Taunt. 268. | (<i>h</i>) Sug. 431. |

but on sales to a company under the provisions of the Lands Clauses Consolidation Act, 1845, whether such sales be voluntary or compulsory, and whether made by absolute or merely statutory owners, the costs of the abstract (in the absence of agreement) are thrown on the company (*i*): and similar provisions (*j*) are contained in most of the earlier railway and other similar Acts.

Chap. VIII.

Except on sales to railway company, &c.

(2.) *As to when the abstract is perfect ;—what it must contain and show.*

For the purpose of conditions, &c., as to time, an abstract is said to be “perfect,” if it be as perfect an abstract as the vendor is able to furnish at the time of delivery (*k*), although the title shown by it may be defective: an abstract is, in the stricter sense of the term, “perfect” or complete, when it shows a perfect title (*l*); that is, when it shows that the vendor is either himself competent to convey to, or can otherwise procure to be vested in, the purchaser, the legal and equitable estates free from incumbrances (*m*).

When “perfect,” within meaning of conditions of sale.

When “perfect,” as showing a sufficient title.

For instance, the non-registration of deeds, which can be registered (*n*), the existence of incumbrances, when the incumbrancers can be compelled to receive their money and join in the conveyance (*o*), the legal estate being outstanding in a married woman, whose interest is bound by an order of the Court of Chancery (*p*), are not imperfections of title.

Certain imperfections in, not considered defects of title.

(*i*) 7 & 8 Vict. c. 18, s. 82.

(*n*) Sug. 446.

(*j*) See *In re London and Greenwich Railway Company*, 3 Ha. 22.

(*o*) *Ibid.*: *Townsend v. Champernown*, 1 Yo. & J. 449; and see 2 Moll. 583; but not if their concurrence cannot be compelled; see *Page v. Adam*, 4 Beav. 269.

(*k*) 2 Ha. 111; and see, at Law, *Blackburn v. Smith*, 2 Exch. 783.

(*l*) 2 Ha. 111; Sug. 445.

(*m*) See and consider, *Lord Braybrooke v. Inskip*, 8 Ves. 436, and other cases cited, Sug. 445.

(*p*) *Jumpson v. Pitchers*, 1 Coll. 13.

Chap. VIII.

But, consistently with the terms of the above proposition, where vendors cannot give to or procure for the purchaser, a valid discharge for the purchase money, the title is defective (*q*).

Should state written consent of parties agreeing to join in sale.

And this is not always sufficient.

Must show where outstanding legal estate is vested.

Showing future right to property, insufficient at law; *semble*.

As in case of mortgage which cannot be discharged.

And the mere statement on the face of the abstract that a party who is not compellable has agreed to join, although usual, is, of course, insufficient; a written agreement to concur should, in strictness, be procured and abstracted: nor is such agreement sufficient, if it do not absolutely bind the interest of the party signing it; *e. g.*, a title dependent on an agreement by a tenant in tail to suffer a recovery, or execute a disentailing deed, would be imperfect (*r*).

So, if the legal estate be outstanding, the abstract must show in whom it is vested (*s*); the existence of the rule appears to be recognised in the judgment in *Avarne v. Brown* (*t*), although the Court, upon the case before it, came to an apparently contradictory decision; but the reporter's note (*u*) seems to intimate that there was some misapprehension as to the facts.

The expression used by Lord *Eldon* (*v*) is, that the abstract is complete, "whenever it appears that, upon certain acts done, the legal and equitable estates will be in the purchaser:" it is, however, conceived that, at least in a Court of Law, it would not be sufficient for the abstract to show merely a future, (although certain and early,) right to the property; for instance, the existence of an incumbrance which cannot be discharged on or before the time fixed for completion (*w*), would, it is conceived, amount at

(*q*) *Forbes v. Peacock*, 12 Sim. 528.

(*r*) *Lewin v. Guest*, 1 Russ. 325; 3 & 4 Will. IV. c. 74, s. 47.

(*s*) *Wynne v. Griffith*, 1 Russ. 2.

(*t*) 14 Sim. 303.

(*u*) See p. 308.

(*v*) 8 Ves. 436.

(*w*) See (a case depending on the specialty of the contract) *Foster v. Hoggart*, 14 Jur. 757. A mortgagee, we may remark, need not receive his money before the day fixed for redemption, although previously ten-

Law to a defect of title: in equity, as a general rule, mortgages and other incumbrances are considered merely matters of conveyance (*x*); and this doctrine has even been extended to cases where the property was mortgaged to an amount considerably exceeding its value (*y*); they seem, however, to have been decided on the principle that the vendor had the legal power, if he used the necessary means, of procuring a conveyance; and the conclusion would, it is conceived, be different, if, by reason of an agreement for the continuance of the charge, or otherwise, the vendor had no right to call on the incumbrancer to join in the conveyance (*z*). Lord *Langdale* observes, on the general question, "Where an interest is vested in a party to secure a right, the satisfaction of which right entitles the party who has sold the estate to call for a conveyance, then the Court considers it a question of conveyance only; but I think it has never gone further than that" (*a*): in which it seems to be assumed that the right is capable of being satisfied at the time when the question of title or no title arises. At any rate it may be considered that the title is perfect, whenever it appears that under the contract the purchaser either already has, or will necessarily, before the time fixed for completion, be able to acquire an immediate and indisputable right to the legal and equitable estates; even although the absence of parties, or other circumstances, may considerably delay the conveyance.

It has, in fact, been held, that a good title was deduced, when it appeared by the abstract that the vendor was tenant in tail in possession and able to convey the fee simple by an enrolled conveyance (*b*): this decision, so far

Chap. VIII

Incumbrances; whether a defect in title in equity.

Title good, although immediate conveyance not procurable.

Whether sufficient if abstract merely show that vendor is tenant in tail in possession.

dered with interest up to such day : 450.

Brown v. Cole, 14 Sim. 427.

(*z*) See 2 Moll. 583, 4 Beav. 269.

(*x*) *Townsend v. Champenown*, 1 You. & J. 449.

(*a*) *Sidebotham v. Barrington*, 3 Beav. 528.

(*y*) *Stephens v. Guppy*, and *Rawson v. Tasburgh*, cited 1 You. & J.

(*b*) *Cattell v. Corrall*, 4 Y. & C. Ex. 228.

Chap. VIII. as it may tend to establish that such a vendor is not bound at once to execute a disentailing assurance and limit the fee simple either to his own use or to his appointment, seems open to observation; it is clear that his contract would give to the purchaser no right which he could enforce in the event of the vendor's death before the execution of the conveyance; which sufficiently distinguishes it from the case put by the Plaintiff's counsel, of a contract entered into by a tenant for life with a power of sale: for a contract to exercise such a power, if entered into for valuable consideration, would be enforced in Equity against remaindermen (*c*); whereas, in the case of the tenant in tail, the jurisdiction of Equity is expressly excluded by Statute (*d*); and it is evidently unreasonable that a purchaser should be put to the expense of investigating the title and preparing his conveyance, when the death of the vendor would deprive him of the estate, and possibly leave him without available remedy for recovery of his costs, and deposit (if any has been paid).

(3.) *As to what abstract should be furnished in various cases.*

As to what abstract should be furnished in certain cases; on purchase by a tenant in common or a copartner.

If one tenant in common purchase of another, he is entitled to an abstract of their general title (*e*); the rule, however, may perhaps be different in the case of a partner purchasing his co-partner's share of the partnership leasehold premises (*f*).

On purchase of allotment.

Upon the sale of lands allotted under an Inclosure Act, the abstract, down to the award, must be that of the title to the lands in respect of which the allotment was made (*g*): when the allotment has been made indiscrimi-

(*c*) 2 Sug. Pow. 118.

(*d*) 3 & 4 Will. IV. c. 74, s. 47.

(*e*) *Morris v. Kearsley*, 2 Y. & C.

139.

(*f*) *Law v. Law*, 9 Jur. 745.

(*g*) Sug. 432.

nately in respect of lands held under different titles, all such titles must be shown by the abstract (*h*). Chap. VIII.

Where the estate has been taken in exchange at common law or under mutual conveyances with eviction clauses, the abstract must, down to the exchange, show the titles to both estates (*i*) ; unless, in the case of a common-law exchange, (as to the future operation of which see 8 & 9 Vict. c. 106, s. 4,) the estate given in exchange has since been aliened (*j*), and the vendor can prove the alienation.

Of land
taken in
exchange.

Where the estate has been taken in exchange under the Acts authorizing the exchange of ecclesiastical property (*k*), or under an Inclosure Act, or the provisions of the 4 & 5 Will. IV. c. 30, (authorizing the exchange of Common Lands,) the title down to the exchange must be that of the estate given in exchange : Sir *E. Sugden*, in fact, (speaking of Exchanges under Inclosure Acts,) states, that "the title of the person holding the estate is the only one relating to it" (*l*) ; this may be admitted if the validity of the exchange be assumed : but, as such exchanges, and also exchanges of common-field lands under the 4 & 5 Will. IV. c. 30, are only authorized to be made by or with the consent in writing of persons having certain specified interests in both estates (*m*), it is conceived, that in such cases an abstract can scarcely be regarded as perfect,

Of land
taken in
exchange
from the
Church or
under In-
closure Act.

(*h*) See and consider, *King v. Moody*, 2 Sim. & St. 579.

(*i*) Sug. 432.

(*j*) 1 Jarm. Conv. by S. 75.

(*k*) 55 Geo. III. c. 147, see s. 3 ; and 56 Geo. III. c. 52 ; and 1 Geo. IV. c. 6. See, as to confirmation of void exchanges, by the tithe commutation commissioners, 5 & 6 Vict. c. 54, s. 7.

(*l*) Page 432.

(*m*) See 4 & 5 Will. IV. c. 30, ss. 2, 4, and 25, in which, note the words, "according to the provisions,"

&c. ; and 6 & 7 Will. IV. c. 115, s. 35. See also 3 & 4 Vict. c. 31, s. 1, which, in cases falling within the Act, makes the award conclusive evidence that the provisions of the general Inclosure Act, and of the 6 & 7 Will. IV. c. 115, have been complied with, and that all necessary consents have been given : but, query, whether this meets the difficulty in the case of an exchange ; it would rather seem to refer merely to such consents as are requisite to the validity of the *Inclosure*.

Chap. VIII.

unless it disclose at least so much of the prior title to the estate taken in exchange as may be sufficient to show that the transaction was within the provisions of the Act: but where the estate has been taken in exchange under the Commons Inclosure Act, 8 & 9 Vict. c. 118, the single title alone seems necessary; as the Act contains a provision making the award, when confirmed, conclusive evidence that the directions of the Act have been complied with, and declaring that every allotment, *exchange*, &c., specified and set forth in the award, shall be binding and conclusive on all persons whomsoever (*n*). So, also, if the title be described in the particulars or conditions as arising under an exchange by virtue of an award under an Inclosure Act, it is sufficient if the abstract show a title by award in respect of other lands and common rights, without showing the particulars of the exchange; and if the agreement be that the title shall commence with the award, the purchaser cannot require the title of the lands given in exchange for those contracted to be sold (*o*).

Of land
taken in
exchange
from a
charity.

Where the title depends upon an exchange under the 1 & 2 Geo. IV. c. 92, (authorizing the exchange of charity lands,) the abstract must show the title as well to the lands given as to the lands taken in exchange; inasmuch as the right of re-entry in case of eviction is expressly reserved to the Charity trustees (*p*); and it is conceived, that the purchaser may require evidence of the land given in exchange having been quietly enjoyed by the charity.

Of estate
which has
attendant
terms.

The title to terms of years attendant upon the inheritance, and which are considered to have merged under the 8 & 9 Vict. c. 112, must still be traced so as to show in whom they were vested at the time when they became

(*n*) Sect. 105; and see, as to partitions by the commissioners, 11 & 12 Vict. c. 99, ss. 13, 14.

(*o*) *Callell v. Corral*, 4 Y. & C. Ex. 228.

(*p*) See sect. 9 of Act.

subject to the operation of the Act; viz.: by abstracting, if practicable, the deed creating the term, and the mesne assignments: these latter, however, may be abstracted very concisely (*q*): the Act, it may be remarked, does not appear to extend to copyholds, or customary freeholds (*r*): and it seems doubtful whether the first and second sections extend to any hereditaments other than *land* technically so called (*s*).

Upon a sale of land formerly copyhold, the abstract must trace the copyhold title, and also the lord's title to the manor, down to the enfranchisement (*t*); and it is said that a purchaser may further require evidence of the manor having, since the enfranchisement, been enjoyed conformably with the title shown by the abstract (*u*).

Upon a sale of leaseholds, the abstract must, (except in the case of a Bishop's lease (*v*),) show the lessor's title, as well as the subsequent title to the term (*w*); even although the lessors were a corporation, and the lease be one of long standing (*x*); the decision, as to the non-production of the Bishop's title (*y*), was on the ground of the lease having been granted in a mode prescribed by an Act of Parliament, and upon the presumed notoriety arising from the use of the episcopal seal; and would seem to apply to leases granted by a Dean and Chapter, and possibly to other cases: and the general rule does not apply when the purchaser enters into the contract with notice that the freehold title cannot be produced (*z*); nor does it appear clear that the rule applies where, on the sale of a lease of

Of enfranchised copyholds.

Of leaseholds—freehold title must be produced.

(*q*) Sug. 436.

(*r*) See Dav. Concise Prec. 79.

(*s*) *Ibid.* 75, 79.

(*t*) Sug. 433: but as to cases where the enfranchisement has been under the general Act, 4 & 5 Vict. c. 35, see s. 64 of Act; *et quære*.

(*u*) 1 Jarm. Conv. by S. 83.

(*v*) *Fane v. Spencer*, 2 Mer. 430.

(*w*) *Souter v. Drake*, 5 B. & Ad. 992; *Hall v. Betty*, 4 Man. & Gr. 410; Sug. 492.

(*x*) *Purvis v. Rayer*, 9 Pri. 488; see p. 522.

(*y*) *Fane v. Spencer*, 2 Mer. 430.

(*z*) Sug. 493.

Chap. VIII.

great antiquity, the vendor shows the creation of the term, and deduces the leasehold title for the last sixty years (*a*). Where, however, the purchaser can require the lessor's title, it would appear, upon principle, that he might also require evidence of the freehold having been, since the demise, enjoyed conformably with the earlier title.

Of renewable leaseholds.

Upon a sale of renewable leaseholds, if, (as generally happens,) the subsisting lease be expressed to be granted in consideration of the surrender of the prior lease, the abstract must show that the surrenderor was the equitable as well as the legal owner of the surrendered lease (*b*).

Of leases for lives.

If the lease be held for lives, evidence must, of course, be given, that the lives are in existence; and this, although there be a covenant for perpetual renewal (*c*).

Of shares in mines.

Upon a sale of shares in mines, the purchaser is not entitled to a regular abstract of title to the mines themselves, as if he were purchasing a share in the land in which they are worked, but he is entitled to such evidence of the constitution of the Company, and of the nature of the title under which the mines are worked, as will show that the subject-matter of the purchase is what it professes to be, and that the proposed form of transfer will give him a valid title to the shares (*d*).

Of pews.

Upon the sale of a messuage with pews claimed as appurtenant thereto, the right to the pews must be proved, either by the grant from the ordinary, or by evidence of prescription (*e*).

Must extend over what period—sixty years.

As to the commencement of the title,—Upon a sale of freeholds, or (it is conceived) of copyholds or renewable leaseholds, the title must go back at least sixty years (*f*).

(*a*) 1 Jarm. Conv. by S. 69.

see 6 Ha. 41.

(*b*) *Coppin v. Fernyhough*, 2 Bro. C. C. 291; *Hodgkinson v. Cooper*, 9 Beav. 304.

(*e*) As to which see a late case of *Pepper v. Barnard*, 7 Jur. 1128; 12 L. J., N. S. Q. B. 361.

(*c*) *Anderson v. Higgins*, 1 J. & L. 718.

(*f*) *Cooper v. Emery*, 1 Ph. 388; *Hodgkinson v. Cooper*, *ubi supra*.

(*d*) *Curling v. Flight*, 2 Ph. 613;

The title to an advowson must be carried back at least one hundred years (*g*); and the abstract should be accompanied by a list of the presentations during the period over which it extends (*h*); the rule, it is conceived, is the same, whether the advowson be sold as in gross or appendant; for although a sixty years' title might be sufficient, if it could be shown that the advowson was in fact appendant to the principal estate, yet the purchaser, it may be contended, has a right to see that no severance of the appendancy is disclosed by the earlier title.

Chap. VIII.

One hundred years on sale of advowson.

Upon the sale of a reversionary interest, whatever may be its antiquity, the abstract must go back sufficiently far to show its creation; and should also show that the estate has been enjoyed in possession, conformably with the instrument which created the reversionary interest (*i*): this, however, only applies to the sale of reversionary interests commonly so called, and not to the sale of an estate subject to an attendant term; in such a case it is sufficient to show a good sixty years' title to the freehold, and to the possession of the term, abstracting also the deed creating the term; and even if this be lost, the loss is said to be immaterial (*j*).

Must show creation of reversionary interest on sale thereof.

Upon the sale of an old term of years, it is sufficient if the abstract show the creation of the term and a sixty years' title to the possession, omitting the intermediate title; nor will the absence of the deed creating the term render the title unmarketable (*k*).

Showing sixty years' title to old term—whether sufficient.

Upon the sale of tithes held as a lay property, or of any other property held, (as such tithes *must* be,) under a grant from the Crown, the abstract should set forth the original grant, and then, omitting intermediate instruments, take

On sale of tithes or other property derived from the Crown must show original grant.

(*g*) See 3 & 4 Will. IV. c. 27,
s. 30.

(*j*) 1 Prest. Abst. 249.

(*h*) Sug. 487.

(*k*) 1 Jarm. Conv. by S. 69;
1 Prest. Abst. 25, 249.

(*i*) 1 Jarm. Conv. by S. 61.

Chap. VIII. up the history so as to show a good sixty years' title (*l*) ; so, where the tithes are considered to have been merged by the tithe-owner under the late Acts, and the estate is sold as tithe-free, the early title to the tithes must be similarly deduced (*m*).

Rules not altered by the estate being merely equitable.

If the purchaser have agreed not to call for the legal estate, this will not shorten the period over which a title must be shown to the equitable estate; and it must also be shown that no adverse use can be made of the legal estate (*n*).

(4.) *As to the preparation, contents, and delivery of the abstract.*

Must if possible commence with a document; old deeds not to be abstracted:

but must be produced if in vendor's possession.

Must commence with what description of document as a root of title.

The abstract must always commence with a document, of at least the requisite age, if the vendor have one (*o*) ; but neither can a purchaser require, nor would the vendor's solicitor be justified in furnishing, an abstract of deeds prior in date to that which would constitute a good root of title (*p*) : the purchaser, however, may require the *production* of every document in the vendor's possession, however ancient (*q*).

As a general rule, the first abstracted documents should purport to deal with the entire legal and equitable estates in the property, or should at least afford *prima facie* evidence that the title to such legal and equitable estates was, at the date of such documents, consistent with the title as subsequently deduced: they should not be dependent for their validity upon any previous instrument: and should contain nothing raising a fair doubt whether the parties claiming the interests there purported to be dealt with, were in fact entitled so to deal with them.

(*l*) 1 Jarm. Conv. by S. 68 ; Sug. 487.

(*m*) *Ibid.*

(*n*) Sug. 495.

(*o*) 2 Sug. V. and P. 138, 10th ed.

(*p*) Sug. 432.

(*q*) 1 Jarm. Conv. by S. 63.

Thus, a general devise in a will of real estate is an insufficient root of title; there being nothing to show that the property in question was intended to, or could, have passed by it; the conveyance to the testator should be abstracted; or, if there are no earlier deeds, evidence should be furnished of his seisin at the date of his will: and even a specific devise is not an eligible root of title.

Chap. VIII.

Not with
will con-
taining
general
devise.

Thus also, it is conceived, a mortgage for a term of years, or a lease, is an improper commencement of an abstract of title to the fee simple, where the vendor has earlier documents; unless, perhaps, in cases where, independently of the mere fact of the demise, (which might be attributed to a power, or to a mere chattel interest in the grantor,) the instrument contains matter which furnishes a fair presumption that he was the absolute owner in fee. A vendor, however, in possession of earlier documents, could not be advised, (except under very special circumstances,) to commence his abstract with a lease; as it would almost inevitably lead to expensive discussions with the purchaser. And where a lease is relied on, it is necessary, unless it expired before the time of living memory, to show that the lessee had actual possession of the estate (*r*).

Whether
with mort-
gage for a
term—or a
lease.

Thus also, an instrument relied upon as an exercise of a power should be preceded by the instrument creating the power; and the admittance to copyholds should be preceded by the surrender; and a recovery deed by the deed creating the entail (*s*).

Nor with
instrument
dependent
for its va-
lidity on
previous
instrument.

“If, however, such deed is lost, and possession has gone along with the estates created by the recovery for a considerable length of time, and the presumption is in favour of the recovery having been duly suffered,” the loss of the deed, and want of evidence of its contents, are no objection

Except in
certain
cases—loss
of prior in-
strument.

(*r*) *Clarkson v. Woodhouse*, 5 Durn.

(*s*) 1 Jarm. Conv. by S. 67.

& E. 412; Burt. Comp. pl. 428.

Chap. VIII.

Nor with document which throws a doubt on earlier title.

to the title (*t*), and the same principle would probably apply in the absence of a deed creating a power (*u*).

So, if the first abstracted document contain recitals or other matter throwing a reasonable doubt upon the title as respects the contents or construction of the earlier documents, the purchaser may require the vendor, not only to produce, but also to abstract, so much of the prior title as may be sufficient to remove such doubt; but, in the absence of such reasonable doubt, the mere fact of earlier documents being recited would not entitle the purchaser to an abstract of them, although he may require their production if in the vendor's possession or power (*v*); and it is sufficient to produce (without abstracting) an instrument which is required simply "to establish a fact or negative an inference" (*w*).

Need not in all cases commence with a document.

It is not *essential* that the origin of the title should be shown either by deed or will; in the absence of documents it may be sufficient to produce evidence of such long uninterrupted possession, enjoyment, and dealing with the property, as to afford a reasonable presumption that there is an absolute title in fee simple (*x*). But the proof of title by evidence of possession is not admissible in cases where documents forming part of the modern title are lost or destroyed; in such cases the vendor must prove their contents and execution (*y*).

But evidence of possession is not sufficient, if modern deeds are lost or destroyed.

Wherever commenced should thence be regularly continued—keeping separate titles separate.

The title, wherever taken up, should be thence continued either in chronological or some other regular order: where separate parts of the estate are held under separate titles, such titles should, of course, be traced separately so long as they remain distinct: every subsequent document deal-

(*t*) *Coussmaker v. Sewell*, Sug. 1 Hayes, Conv. 566.
486. (*w*) Sug. 431.

(*u*) See *Nouaille v. Greenwood*, (*x*) *Cottrell v. Watkins*, 1 Beav.
Turn. & R. 26. 365.

(*v*) See *Prosser v Watts*, 6 Madd. (*y*) *Bryant v. Busk*, 4 Russ. 1;
59; 1 Jarm. Conv. by S. 63 and 64; Sug. 460.

ing with the legal estate, (except expired leases, and with the exceptions already referred to (z),) should be abstracted; for instance, a mortgage and reconveyance are not to be suppressed under the notion that the title has been thereby brought back to its original state; such may, or may not, have been the case; and is a point to be determined by the advisers of the purchaser, not of the vendor: all documents forming part of the title should be abstracted in chief; the introduction of them merely as recitals in other abstracted instruments, (which is not uncommon, especially in the case of wills,) is, it is apprehended, clearly improper; were it not so, a copy of the conveyance to the vendor might, in many cases, take the place of an abstract: besides which, the omission to abstract a document in chief may proceed from a desire to avoid noticing matters of a suspicious character occurring in such document, but which are not noticed in the recital: it is convenient to introduce, in their proper places, direct statements of deaths, marriages, and other matters of pedigree; and not, as is frequently done, to trust to the recitals in the abstracted documents; and in cases of complicated descents, &c., a regular pedigree should accompany the abstract.

Documents affecting merely equitable interests give rise to considerations of greater difficulty; Sir *E. Sugden* states generally, that the solicitor "should abstract every document upon which the title depends, or upon which any difficulty has arisen: wherever he begins the root of the title, he ought to abstract every subsequent deed" (a): this, however, it is conceived, must be understood to mean every document upon which the *purchaser's* title will necessarily depend; if, for instance, the vendor be possessed of a document declaring that a prior owner who purchased, apparently on his own account, was in fact a trustee, or, that

Chap. VIII.

All documents affecting legal estate to be abstracted.

Documents should be abstracted in chief.

Statements of matters of pedigree.

Suppression of instruments evincing immaterial or satisfied equities—how far justifiable.

(z) *Supra*, p. 139.

(a) *Sug.* 432.

Chap. VIII.

a mortgage-debt was trust-money, the title of the *vendor* who has notice of the trust may depend upon various instruments which would be altogether immaterial to a purchaser destitute of such notice; and it would, it is conceived, be unusual and highly improper, for the solicitor to allow notice of such a trust to appear upon his abstract: this, however, it must be admitted, is, *pro tanto*, a departure from the general principle, that it is for the purchaser's solicitor, and not the vendor's, to judge of the materiality of the muniments of title: but it is sanctioned by convenience and universal practice. Other cases may perhaps occur in which a document may be, without material risk, suppressed; as, for instance, where a good title is shown to the legal estate, and a charge, which clearly operated merely in equity, has been paid off and no trace of it appears upon the subsequent title; the difference between the suppression of such an instrument and a legal mortgage is evident; the equitable charge has no operation as against a subsequent purchaser for valuable consideration without notice, and his title, therefore, is not dependent on the sufficiency of the release; nor does there seem to be any good reason for making a distinction between an equitable charge by deed, and a mere memorandum accompanying an old equitable mortgage by deposit, which, except upon special grounds, is never abstracted; but, in the case of a legal mortgage, the purchaser's title at Law will depend (theoretically if not practically) upon the legal validity of the deed of reconveyance, whether its existence be known to him or not: still, even in the case of the equitable charge, it seems at least probable that a solicitor who suppresses it, under the idea that it is unimportant to the title, does so at his own risk (*b*); and it is submitted, that such a course should rarely, or never, be

Deed which
may operate
on legal
estate

(*b*) See Sug. 432.

taken, in respect of an instrument which is so framed that it could by possibility affect the legal estate; as, for instance, a mortgage of an equity of redemption, drawn as a conveyance with a proviso for redemption; and which, although merely a charge in Equity if the first mortgage be valid in Law, would yet pass the legal estate supposing it not to have been effectually transferred by the prior instrument.

Chap. VIII.

should
never be
suppressed.

The loss of a deed of a date subsequent to the commencement of the abstract, is no objection to the title, if, under all the circumstances, the clear presumption be that the instrument, if produced, would not throw any difficulty about the title (*c*); this doctrine, however, must be applied with the greatest hesitation to cases where modern deeds are lost, and no satisfactory evidence exists of their contents (*d*).

As to loss of
modern
deeds.

The abstract should notice all judgments and other subsisting charges upon the property (*e*).

Judgments,
&c., should
be noticed.

The general rules for abstracting documents are ordinarily known, and may be found in full, in Sir *E. Sugden's* treatise, and in the first volume of Mr. *Sweet's* valuable edition of Mr. *Jarman's* work on conveyancing.

Copies of wills abstracted, (if at all of an informal character,) and of private Acts of Parliament upon which the title depends, should accompany the abstract.

Should be
accompa-
nied by
copies of
wills and
private
Acts.

A statement of the evidence which the vendor is able to produce in support of the title may conveniently accompany the abstract; this, however, is not often attended to.

And by
statement
of evidence.

Cases not unfrequently occur of complicated titles, in which the solicitor who prepares the abstract will be justified in laying it before counsel on behalf of his own client; this remark applies particularly to heavy mortgage transactions, in which considerable expense to the mortgagor

As to con-
sulting
counsel
thereon on
behalf of
vendor.

(*c*) *Minchin v. Vance*, 2 S. Atk.

(*d*) *Vide infra*.

Conv. 386, b.

(*e*) *Sug*. 445.

Chap. VIII.

How to be
copied.

Effect of
non-delivery of abstract, on
purchaser's
liability
under the
contract.

Non-delivery how
to be taken
advantage
of.

Suggested
course of
proceeding
by purchaser.

may frequently be saved by the delivery in the first instance of a perfect and well-verified abstract.

An abstract may be written so illegibly, or upon paper of such an inconvenient size or substance, as to justify the purchaser's solicitor or counsel in declining to receive it (*f*).

The non-delivery of a perfect (*g*) abstract on the day named, discharges the purchaser from any conditions binding him to make objections, &c., within a specified time after delivery (*h*); and, at Law, relieves him altogether from the contract (*i*): in Equity, however, the purchaser will be bound if either he neglect to apply for the abstract within a reasonable time before the day fixed for its delivery (*j*), or if, upon its being subsequently tendered, he receive it without objection (*k*): but the wilful neglect on the part of a vendor to prepare the abstract within proper time, when pressed by the purchaser to do so, will, even in Equity, entitle the purchaser to avoid the contract so soon as the time fixed for completion is elapsed (*l*): where the purchaser's solicitor intends to rely upon the non-delivery of the abstract upon the day named, or (if no day have been named) within a reasonable time before the day fixed for completion, he should decline to receive it; or, if forwarded to him under circumstances which gave no opportunity for its rejection, he should at once return it, and without reading it (*m*).

Where it is important to the purchaser to complete (if at all) at or about the time fixed for completion, and the abstract, having been called for, is delivered so late as to

(*f*) See Sug. 431.

(*g*) *Vide supra*, p. 131.

(*h*) *Southby v. Hutt*, 2 Myl. & C. 211.

(*i*) Sug. 289; *Berry v. Young*, 2 Esp. 640, n.

(*j*) *Guest v. Homfray*, 5 Ves. 818,

823; *Jones v. Price*, 3 Anst. 924.

(*k*) Sug. 290; *Smith v. Burnam*, 2 Anst. 527.

(*l*) Sug. 290; *Seton v. Slade*, 7

Ves. 265.

(*m*) See 7 Ves. 278.

render it doubtful whether this can be accomplished, the most expedient course would appear to be, to return it unread; offering, however, to receive it again, without prejudice to the purchaser's right to annul the contract, if, on investigating the title, it should be found impossible to complete at (or within some short specified period after) the time originally fixed for completion.

(5.) *As to the examination and perusal of the abstract.*

The purchaser's solicitor is entitled, if he please, to compare the abstract with the deeds before investigating the title, and the vendor (assuming that there is a binding contract) must pay the costs if the title prove bad (*n*); but unless the abstract be apparently defective, it is better to defer doing so until counsel's opinion (if taken) is obtained upon it (*o*).

Whether to be compared with deeds before investigation of title.

A purchaser's solicitor, it is conceived, is *primâ facie* legally justified in incurring the expense of counsel's opinion upon the abstract; in London, perhaps, the majority of titles (except those of the simplest description) are submitted to counsel; in the country, the practice inclines considerably the other way: it may be here remarked that the decisions of the various Courts of Law and Equity have a retrospective effect upon titles; so that, in estimating the value of a favourable opinion taken a few years previously, allowance must be made for the possibility of the title having been since rendered unmarketable, possibly unsafe, by some intermediate and unexpected exposition of the law. The abstract, when submitted to counsel, should, of course, be accompanied by a copy of the agreement and conditions of sale (if any).

As to consulting counsel thereon on behalf of purchaser.

It is presumed that every person who habitually

As to pe-

(*n*) *Hodges v. Earl of Litchfield*, 1 Bing. N. C. 499. (o) Sug. 437.

Chap. VIII.

using ab-
stracts.

Suggested
mode of pe-
rusal.

peruses abstracts keeps some memoranda of their contents ; an abstract book is desirable, not only as an assistance in the perusal, but also for the purposes of reference on future occasions.

Sir *E. Sugden* recommends that an abstract should be perused at a single sitting (*p*) : this, although desirable, is often impracticable : it is suggested, that the most convenient plan of perusal, (especially for those whose experience is limited) is as follows ; viz., immediately upon perusing, and thoroughly understanding, an abstracted document, to enter it, by its date and parties, in the abstract book, with as concise a statement as possible of its effect, and a memorandum of any peculiarity which may appear in its contents, or of any deficiency in the usual statements as to execution, registration, indorsement of receipts, &c. ; and then, in the margin of the abstract book, to make all those queries and requisitions which would properly be made if the instrument in question were the termination of the title, except such as the early date of the instrument, or other circumstances, may render evidently unnecessary : for instance, an estate tail has been created ;—the query will be, “how has this been barred?” a man acquires within a recent period an estate in fee,—the query will be, “is any widow dowable?” the estate is charged with an annuity,—the query will be, “is this a subsisting charge?” a death or descent is stated,—the marginal note will be, “produce the usual evidence :” a deed is not registered,—the marginal note will be, “must be registered at the vendor’s expense :” in all probability, on advancing further in the abstract, most of the queries will be satisfactorily answered, and many of the requisitions will be found to be unnecessary ; and, whenever this is the case, the pen may be passed lightly through the marginal

note, not so as to render it illegible, but merely to show that it is unimportant, and the number of the subsequent page which supplies the information may be added by way of reference; by adopting this course, or some modification of it, an interruption in the perusal of the abstract is rendered comparatively unimportant; a very short reference to the abstract book is sufficient to show how matters stood at the time of the interruption; and when the perusal is finished, such of the marginal notes as have not been crossed out will furnish safe materials for the opinion.

Chap. VIII.

The acceptance of a title, of course, is no waiver of objections which are not disclosed by the abstract (*q*); nor, is a client bound by his counsel's acceptance of a defective title, even although the defect appear upon the abstract (*r*): if, however, counsel waive a requisition, and the purchaser adopt his opinion and deal with the vendor on that view, he cannot afterwards repudiate it (*s*).

Acceptance
of title
shown by—
to what it
extends.

If a solicitor be concerned for both parties, although of course bound to see that the purchaser does not buy with a defective title, or buy that which is in fact his own, he is not at liberty to disclose defects in the vendor's title of which the purchaser might himself take advantage: and a solicitor acting in contravention of the rule has been held liable in an action for damages (*t*).

Defects in
client's
title must
not be dis-
closed to
client en-
titled to
take ad-
vantage
thereof.

(6.) *As to the verification of the abstract.*

Assuming that an apparently good title is deduced by the abstract, the next matter for consideration is, the evidence which a purchaser may require in support of it;

Verification
of abstract
— what evi-
dence may
be required

(*q*) *Att.-Gen. v. Sitwell*, 1 Y. & C. 570; *Ward v. Trathen*, 14 Sim. 82; 8 Jur. 303.

(*s*) *Alexander v. Crosby*, 1 Jo. & L. 666.

(*t*) *Taylor v. Blacklow*, 3 Bing.

(*r*) See *Deverell v. Lord Bolton*, 18 Ves. 505.

N. C. 235.

Chap. VIII.
in proof of
documents
and facts.

and this subject naturally divides itself into two heads; viz., first, what evidence may be required of the existence and genuineness of abstracted documents; and, secondly, what evidence may be required of other matters of fact.

As to proof
of private
Acts.

A private Act of Parliament is sufficiently proved by the printed copy, if printed by the Queen's printer; and a recent Statute renders it unnecessary to prove that the copy purporting to be, was in fact, so printed (*u*); nor was such proof previously necessary as respects private Acts which contained the usual clause making printed copies evidence: in default of such evidence, an Act should be proved by a copy examined with the original (*v*).

Of awards
under In-
closure
Acts.

An award under an Inclosure Act is proved by a copy, or extract, signed by the proper officer of the Court, if the enrolment have been made in one of the Courts at Westminster; or by the Clerk of the peace for the County, or his deputy, if the enrolment have been made with the Clerk of the peace (*w*).

Of copyhold
assurances.

Copyhold assurances are proved by the copies of Court Roll signed by the steward; and it appears that, in strictness, evidence may be required of the steward's handwriting, except, perhaps, where he is dead, and the document is above thirty years old and comes from the proper custody (*x*): such a requisition, however, when even modern copies come from the proper custody, is not usual in practice, unless there are special grounds for suspicion: copies authenticated by the steward are evidence, although they are not the copies originally delivered to the tenant (*y*); and so also are mere examined copies (*z*): the

(*u*) 8 & 9 Vict. c. 113, s. 3.

(*v*) 1 Jarm. Conv. by S. 169: as to proof of old private Act, which has been omitted from the Parliament Roll, see *Doe v. Brydges*, 7 Sc. N. R. 338.

(*w*) See 41 Geo. III. c. 109, s.

35; 3 & 4 Will. IV. c. 87, s. 2.

(*x*) 1 Scriv. on Cop. 497; *Wynne v. Tyrwhitt*, 4 Barn. & Ald. 376.

(*y*) *Breeze v. Hawker*, 14 Sim. 350.

(*z*) See *Doe v. Freeman*, 12 Mee. & W. 844; and examined copies, not

purchaser may, it is conceived, in the absence of special agreement, generally compel the vendor (at his own expense) to verify his abstract by the production of authenticated or examined copies, in cases where the originals are lost, even although the steward will allow the purchaser to inspect the Court Rolls (*a*) ; probably, however, the rule might be different when, as may often happen, the vendor's solicitor, by being himself the steward, or otherwise, is enabled to produce the original Rolls at the proper place for verification of the abstract, and can prove the loss or destruction of the original copies, so as to avoid any difficulty which may be raised by the doctrine of *Whitbread v. Jordan* (*b*). If the vendor be thus obliged to procure fresh copies for the purpose of verification, they will (unless he retain, or sell to another person, an estate of greater value held under the same title) belong to the purchaser (*c*). If a surrender have been by attorney, the power of attorney must be produced, and evidence must be given of the principal having been alive at the time of its being acted on (*d*) ; and where the power was not given for valuable consideration, inquiry should be made whether it was revoked prior to its apparent exercise : the statement of a power of attorney on the Court Rolls is secondary evidence of the original, if the latter cannot be found (*e*).

Deeds abstracted must be proved by the production of the originals, if not lost or destroyed (*f*) ; the attesting witnesses (if alive), may, perhaps, in strictness be required to prove the due execution (*g*), unless the deed is thirty

Of deeds.

signed by the Steward, do not require
Stamps : *S. C.*

(*a*) *Scriv.* 493.

(*b*) 1 *Y. & C. Ex.* 303.

(*c*) *Scriv.* 494 ; *Sug.* 476.

(*d*) *Sug.* 442.

(*e*) *Doe d. Counsell v. Coperton*, 9

Car. & P. 112.

(*f*) As to mutilation of deeds, and defects in the Stamps, &c., *vide infra*, p. 161.

(*g*) *Laythoarp v. Bryant*, 1 *Bing. N. C.* 421.

Chap. VIII. years old and comes from the proper custody (*h*) ; but this, where a modern deed comes from such custody (*i*), is never urged in practice except upon special ground (*j*) : when a deed has been executed by attorney, the same requisitions and inquiry should be made as in the case of a surrender by attorney (*k*) : where the loss or destruction of a deed can be proved (*l*), secondary evidence may be given of its contents ; but proof must also be given of its due execution and delivery (*m*) ; an attested copy, however, taken and kept for 110 years in a public office, of a deed which could not be found, was admitted by Lord *Hardwicke* as sufficient evidence of the original ; and he intimated that, under the special circumstances, a plain copy would have been admissible (*n*) : so, in a recent Peerage case, the House of Lords admitted as evidence an attested copy of a settlement dated in 1693, produced from the proper custody, and according to which possession of the estates had gone for many years (*o*). Examined copies of deeds required by Law to be enrolled, are, it appears, sufficient evidence of the originals ; but, where the enrolment is not compulsory, a copy is evidence only as against the parties on whose acknowledgment enrolment was made, and their representatives (*p*) : and the non-production of

(*h*) 2 Phill. on Ev. 203 ; *Man v. Ricketts*, 7 Beav. 93.

(*i*) *I. e.*, a place where it may reasonably be expected to be found, although not the *most proper* place of custody : *Croughton v. Blake*, 12 Mee. & W. 205 ; *Doe v. Phillips*, 8 Q. B. 158.

(*j*) 1 Jarm. Conv. by S. 179. Sir E. Sugden seems to think that it is sufficient, in the absence of special circumstances, on the sale of freeholds, to prove the due execution of the conveyance of the fee to the ven-

dor : V. and P. 463.

(*k*) *Supra*, 151.

(*l*) As to what evidence of loss is sufficient, see *Hart v. Hart*, 1 Ha. 1 ; *Green v. Bailey*, 15 Sim. 542.

(*m*) *Bryant v. Busk*, 4 Russ. 1 ; *Southby v. Hutt*, 2 Myl. & Cr. 207 ; and see *Doe v. Brydges*, 7 Sco. N. R. 339.

(*n*) *Harvey v. Philips*, 2 Atk. 541.

(*o*) *Fitzwalter Peerage*, 10 Cl. & Fin. 952.

(*p*) 1 Jarm. Conv. by S. 170.

the original should be accounted for (*q*). The recital of a deed is evidence of its existence as against all parties executing the deed containing the recital, and those claiming under them, but is no evidence of its contents or effect beyond what its name and nature necessarily imply, unless proof be given of its loss or destruction (*r*): an examined copy of the memorial of a deed registered in a Register County is secondary evidence of the deed as against the parties thereto, and all persons claiming under them (*s*), but probably not as against strangers (*t*).

In a case in Ireland, by a settlement executed in 1745, estates were limited in strict settlement, with a power of revocation reserved to the settlor; this power was stated to have been exercised by a will dated in 1761, but of which neither the original nor any copy could be produced; the estates were re-settled in 1763 by a deed which recited the power of revocation and exercise of the power by the will, and possession had ever since gone under this deed: under these circumstances, *Sugden, C.*, held the recital to be sufficient evidence of the contents and execution of the will (*u*).

The same estates were limited in strict settlement in 1788; in February, 1814, the tenant for life and first tenant in tail entered into articles of agreement to bar the entail and re-settle the estates to certain specified uses, with a power of revocation; neither the original nor any copy of the articles could be produced, although search had been

(*q*) But the enrolment, or an examined copy of the enrolment, of any deed executed under the provisions of the Acts relating to the Duchy of Cornwall, is sufficient proof of the contents and due execution of the original, although its non-production be not accounted for; see 7 & 8 Vict. c. 65, s. 34.

(*r*) Burt. Comp. 478, *et seq.*

(*s*) *Wollaston v. Hakewill*, 3 Man. & Gr. 297; *Doe v. Clifford*, 2 Car. & K. 448.

(*t*) *Doe v. Clifford*, *ubi supra*: but see *Collins v. Maule*, 8 Car. & P. 502.

(*u*) *Alexander v. Crosby*, 1 J. & L. 666.

Chap. VIII. made for them; they were, however, recited in the deed making the tenant to the præcipe which was dated March 1814; in 1815, upon the marriage of the tenant in tail, the power of revocation was exercised, and the estates were re-settled, and had since been enjoyed accordingly: *Sugden, C.*, after remarking that the articles appeared to have been voluntary, and that the settlement was for consideration, held that, under the special circumstances of the case, the recital was sufficient evidence of the contents of the articles (*v*).

Probably, in the above case the decision might have been different, if, instead of mere articles of agreement, the missing instrument had been one which affected the legal estate.

Lease for a
year proved
by recital.

The recital or mention of a lease for a year in any conveyance executed before the 15th May, 1841, is sufficient evidence of the execution of such lease; without proof of its loss (*w*): and in any renewed Ecclesiastical lease granted since the 21st June, 1836, (unless in pursuance of a covenant or agreement entered into before the 1st of March, 1836,) the recital of the old lease, and of the deaths, &c. of the *cestuis que vie*, is conclusive evidence thereof (*x*).

Renewed
Ecclesiastical lease.

Fines and
Recoveries.

A Fine should be proved by the chirograph, or an exemplification under the seal (*y*) of the Court, or a copy examined with the original roll and proved by the oath of the examiner (*z*): mere office extracts, although often relied on, and generally received by conveyancers, are not evidence (*a*).

A Recovery is proved by an exemplification or an examined copy (*b*).

(*v*) *Alexander v. Crosby*, 1 J. & L. 666.

(*w*) 4 & 5 Vict. c. 21, s. 2.

(*x*) 6 Will. IV. c. 20, ss. 2 & 9.

(*y*) The loss of the seal is immaterial, if the document come from the

proper custody; *Mayor of Beverley v. Craven*, 2 Moo. & R. 140.

(*z*) Burt. Comp. pl. 487; *Doe v. Ross*, 7 Mee. & W. 102.

(*a*) Buller's N. P. 227.

(*b*) Burt. Comp. pl. 490.

Where an estate has been purchased and held for twenty years or upwards under a title which depends upon a recovery which has not been enrolled, the deed duly making the tenant to the præcipe, and leading the uses of the recovery, is sufficient evidence thereof, as in favour of the purchaser and all parties claiming under him (c).

Chap. VIII.

Proof of,
under sta-
tutes.

The 3 & 4 Will. IV. c. 74, s. 13, provides for the change of custody of the Records of Fines and Recoveries levied and suffered at Westminster, Lancaster, and Durham; and makes extracts and copies, supplied after such change of custody, as available in evidence as they would have been if supplied in the usual way before the passing of the Act; and, by the 5 Vict. c. 32, provision is made for the enrolment, in the office of the Registrar of the Court of Common Pleas at Westminster, of the proceedings in Fines and Recoveries levied and suffered in the Courts of Great Session in Wales, and the Court of Great Session in Cheshire, and for remedying in certain cases defects in the original Records (d); and by the 11 & 12 Vict. c. 70, evidence of Fines at Westminster having been levied with Proclamations is rendered unnecessary.

A grant from the Crown is regularly proved by an exemplification, or certified copy; but if the original be lost, and the vendor's solicitor ascertain and inform the purchaser where the grant is enrolled, the latter cannot, it appears, require a copy, but must examine the enrolment at his own expense (e).

Proof of
Grant from
Crown.

Proceedings in the Courts of Law and Equity are regularly proved by exemplifications under the seals of the Courts, or authenticated by the signature of the Judge, (in cases where the Court has no seal (f)); and proof of

Of proceed-
ings at Law
and in
Equity.

(c) 14 Geo. II. c. 20, s. 4.

(e) Sug. 450.

(d) See *Doe v. Price*, 16 Mee. & W. 603.

(f) *Alves v. Bunbury*, 4 Camp. 28.

Chap. VIII. the seal or signature is rendered unnecessary by the 8 & 9 Vict. c. 113.

And in
Bankruptcy
and Insol-
vency.

Proceedings in Bankruptcy and Insolvency are proved by copies certified in manner directed by the several Acts; see as to Insolvency, 53 Geo. III. c. 102, s. 24; 7 Geo. IV. c. 57, s. 76; 1 & 2 Vict. c. 110, s. 105; 5 & 6 Vict. c. 116, s. 11; 7 & 8 Vict. c. 96, s. 37: and as to Bankruptcy, 6 Geo. IV. c. 16, s. 97; 1 & 2 Will. IV. c. 56, s. 29, and 12 & 13 Vict. c. 106, ss. 232 *et seq.*; proof of the seals and signatures is rendered unnecessary by the 8 & 9 Vict. c. 113.

As to the
enrolment
of proceed-
ings in
Bankrupt-
cy.

The fiat, (or, if the case be under the recent Act (*g*), the Petition,) adjudication, and certificate of appointment of assignees, if not enrolled, ought to be entered on record by the vendor, and at his expense; Mr. *Jarman* considers that this is necessary although the bankrupt will join in the conveyance (*h*); Sir *E. Sugden's* opinion is the other way; and also, that such a requisition cannot be insisted on if it be too late to upset the fiat (*i*).

Proof of by
office copies.

Office copies, (*i. e.* copies made by an officer of a Court under its authority,) although not strictly evidence, except in the causes or matters to which they belong, are received as evidence by conveyancers.

As to cer-
tified copies
of Records
under 1 & 2
Vict. c. 94.

And we may here remark, that by the 1 & 2 Vict. c. 94, the Records of the Courts of Chancery, Exchequer, Queen's Bench, and Common Pleas, and of the abolished Courts in Wales, Chester, Durham, and Isle of Ely, are committed to the custody of the Master of the Rolls; and, by sections 12 and 13, certified copies of such Records under the seal of the Record Office, are made evidence equally with the originals.

Proof of
Will.

The probate, or (if that be lost) an official copy, is

(*g*) 12 & 13 Vict. c. 106.

(*h*) 1 Jarm. Conv. by S. 97.

(*i*) Sug. 672.

usually received by conveyancers as sufficient evidence of a will, whether relating to real or personal estate (*j*); although the probate has been held to be in strictness inadmissible, even as secondary evidence, in a question of title to freehold (*j*) or copyhold (*k*) property: however, in recent Peerage cases, the copy of a will produced from the Prerogative Office has been received in evidence, upon the absence of the original from the Office being accounted for (*l*); the Probate Act Book of the Ecclesiastical Court is evidence of the appointment of executors (*m*); and an official extract from such book is often received in practice, where (as in the case of tracing a title to a chattel real held in trust) there is little chance of the will containing a specific bequest of the term which may have been assented to by the executor (*n*): where, however, a title has to be shown to a beneficial chattel interest, the risk of there having been such a bequest and consent renders it necessary to examine the entire will; and it is conceived that the purchaser may, in either case, require production of the probate or an office copy. A will thirty years old, produced from the proper custody, proves itself; and the thirty years are to be computed from the date of the will and not of the death (*o*).

(*j*) 4 Jarm. Conv. by S. 178.

(*k*) Scriv. on Copyhold, 499; *Jerroise v. Duke of Northumberland*, 1 Jac. & W. 570; but see *Archer v. Slater*, 10 Sim. 624; 11 Sim. 507. And see, as to the proof of a Will, the original of which is abroad or has been lost, *Pullan v. Rawlins*, 4 Beav. 142, and notes of cases subjoined; and *Rand v. Macmahon*, 12 Sim. 553.

(*l*) *Fitzwalter Peerage*, 10 Cl. & Fin. 952; *Braye Peerage*, 6 Cl. & Fin.

767; see, however, the *Netterville Peerage*, 2 Dow. & Cl. 342, where Lord Eldon held, that proof must be given of the actual loss or destruction of the original.

(*m*) *Cox v. Attingham*, Jac. 514.

(*n*) The clause disposing of trust estates is generally so worded as to exclude chattels real—besides which the devisees in trust are usually the executors.

(*o*) *Man v. Ricketts*, 7 Beav. 93.

Chap. VIII.

In deducing title to chattel interests Probate must be seen to have been granted by proper Court.

Will need not be proved in equity.

Documents not part of the title must sometimes be produced as negative evidence.

In examining the title to a chattel interest, care should be taken to see that probate has been granted by a Court having jurisdiction: it appears, that where an executor takes out Prerogative Probate, and dies leaving an executor who proves in a Diocesan Court, the title of the second executor, as a representative of the original testator, is too doubtful to be forced upon a purchaser (*p*).

Upon a sale by a devisee of a freehold estate, the purchaser cannot (*q*), except under special circumstances (*r*), require the will to be proved in equity against the heir-at-law.

It may sometimes happen that a purchaser can require the production of an instrument although it forms no part of the title, and although he cannot claim an attested copy on completion; *e. g.*, where property is vested in trustees, in trust to sell, with power to give receipts, and the trusts of the purchase-money are declared by a settlement referred to in the conveyance, it is generally considered that a purchaser can require the production of the settlement for the purpose of seeing that it contains nothing inconsistent with the power to give receipts, nor any other matter affecting the title, but that he is not entitled to any attested copy or covenant for production; and the fact of his not being entitled to such covenant or copy, negatives, it is conceived, the right of any subsequent purchaser to require the production of the settlement (*s*): it must, however, be noticed, that in a case of *Cooper v. Emery* (*t*), upon a sale by a party claiming under the heir-at-law of a deceased owner who left a will, Sir *L. Shadwell*, V. C., is reported to have held that the purchaser was entitled to inspect the will, but could not

(*p*) *Williams v. Bland*, 2 Coll. 575.

(*q*) Sug. 464.

(*r*) *Grove v. Bastard*, 2 Ph. 619.

(*s*) 2 Ha. 260.

(*t*) Cited, 1 Hayes, Conv. 573.

insist upon a covenant for its production ; thus, apparently, deciding, that he was bound to accept a title without the ordinary means of proving its validity on a resale. Chap. VIII.

In many cases, however, where the possession has been consistent with the *primâ facie* title, presumption may supply deficiencies in proof of the existence, or due execution, of material instruments (*u*) : the principle in the case of deeds, (and which, in general, seems equally applicable to other instruments operating *inter vivos*;) being this, viz., that where there has been long enjoyment of any right which could have had no lawful origin except by deed, there, in favour of such enjoyment, all necessary deeds may be presumed, if there be nothing to negative such presumption (*v*) : for instance, a grant from the Crown of an Advowson (excepted in a former grant under general words) has been presumed as against a purchaser, after an uninterrupted possession evidenced by title deeds for 133 years and three presentations³ (*w*) ; so, a reconveyance of the legal estate from trustees has been presumed, the property having for 110 years been dealt with without reference to its remaining outstanding, although the enjoyment was consistent with the supposition of such being the case (*x*) ; so, where copyholds were devised to trustees, upon trust to pay testator's debts, funeral expenses, two annuities, and a legacy, and then to convey the premises to T. W. ; and T. W. was admitted in 1771, and a party claiming under him accepted an enfranchisement in 1791, the validity of which was considered to depend upon

Deficiencies in proof of documents, how far supplied by presumption.

General rule.

Presumption of grant from Crown.

Of reconveyance of legal estate.

Of copyhold surrender.

(*u*) See *Chalmer v. Bradley*, 1 Jac. & W. 63.

(*v*) *Lyon v. Reed*, 13 Mee. & W. 285, 303 ; approved in *Creagh v. Blood*, 3 J. & L. 133 : and see *Monck v. Huskisson*, 1 Sim. 285 ; *Att.-Gen. v. Fishmongers' Company*, 5 Myl. & Cr. see p. 25 ; and see early

cases collected in *Read v. Brookman*, 3 Durn. & E. 151.

(*w*) *Gibson v. Clark*, 1 Jac. & W. 159.

(*x*) *Hillary v. Waller*, 12 Ves. 239 ; and see *Emery v. Grocock*, 6 Madd. 54 ; and *Noel v. Bewley*, 3 Sim. 103.

Chap. VIII.

Of payment
of mortgage,
and of re-
conveyance.

Of surren-
der to use of
will.

Of enfran-
chisement.

Of mesne
assignments
of Terms.

Of grant of
easement.

the regularity of T. W.'s admittance, a prior surrender by the trustees to the use of T. W. was presumed as between vendor and purchaser (*y*) ; so, payment of a mortgage debt, and a reconveyance of the legal estate, have been presumed after an interval of eighty years, the mortgage not being subsequently mentioned in the title deeds, and the mortgage deeds having for twenty-five years been in the possession of the vendor and his ancestors, during which period no claim, it was alleged, had been made for principal or interest (*z*) : so, after forty years' possession of copyholds under a will, a surrender to the use of the will was presumed in an early case (*a*) ; so, the enfranchisement of a copyhold has, after an enjoyment of 160 years, been presumed even against the Crown (*b*) : so, in the general, it will be presumed that mesne assignments of attendant terms have been regularly made (*c*).

So, the grant of an easement will be presumed after twenty years' enjoyment (*d*) ; but, to raise such presumption, it is necessary to show, not only enjoyment, but that the party to whom the grant is attributed had power to make it (*e*).

(*y*) *Wilson v. Allen*, 1 Jac. & W. 614.

(*z*) *Cooke v. Soltau*, 2 Sim. & St. 154 ; but the lapse of 46 years from the death of a Testator, and of 39 years from the last notice of legacies charged by his Will, has been held insufficient to warrant a presumption of their payment : see *Shields v. Rice*, 3 Jur. 950.

(*a*) *Lyford v. Coward*, 1 Vern. 195.

(*b*) *Roe v. Ireland*, 11 East, 230.

(*c*) *Earl v. Baxter*, 2 W. Bla. 1228. As to presuming the surrender of satisfied terms for years, see Sug. Appendix, 26 ; and *Garrard v. Tuck*, 13 Jur. 871, C. P. The late Act of 8 & 9 Vict. c. 112, has

deprived the doctrine of much of its practical importance : it must, however, be remembered, that the Act is not of universal application, *supra*, p. 137 ; and that where it applies, a vendor must still show in whom old terms, supposed to have been destroyed by the Act, were vested on the day when it came into operation, and that they were then attendant on the inheritance ; so that the doctrine above referred to, of presuming the existence of mesne assignments, is still of practical moment.

(*d*) See *Darwin v. Upton*, cited 3 Durn. & E. 159 ; and later cases cited in 4 Jarm. Conv. 151.

(*e*) *Barker v. Richardson*, 4 B. &

So, the formalities of a deed are readily presumed; for instance, sealing and delivery will be presumed from proof of signing, and the whole will (if the deed comes from proper custody) be presumed after 30 years without any proof at all (*f*); or within that time from proof of a deceased subscribing witness's handwriting (*g*); so, in a modern case, the House of Lords held that a parchment writing, purporting to be the first skin of an Indenture consisting originally of two or more skins, and severed by a sharp instrument, but which came from the proper custody, was properly received in evidence in ejectment; and that the mutilation of a deed forms an objection rather to the value than to the admissibility of the evidence (*h*): so, livery of seisin will be presumed after twenty years' consistent possession (*i*); so it will be presumed that persons who have executed an award under the general Inclosure Act were regularly appointed and took the necessary oaths (*j*); so, it will be presumed that an instrument, duly executed and which is lost, was also duly stamped (*k*), unless the particular circumstances of the case forbid such a conclusion; as where the instrument has been fraudulently destroyed by the party chargeable thereon, and it can be shown to have been unstamped when it came into his possession (*l*); so also that stamps, the amount of which is obliterated, were of the right amount (*m*); but the Courts will not presume that forms have been com-

Chap. VIII.
Of the formalities of deeds.

Notwithstanding mutilation.

Of livery of seisin.

Of appointment of Inclosure Commissioners.

Of deeds having been duly stamped.

But not of forms required by Law on

Ald. 579; as to the statutory title which may be acquired under the recent Acts, and which is independent of the title which may be acquired under the ordinary doctrine of presumption (*Welcome v. Upton*, 5 Mee. & W. 398; *Dewhirst v. Wrigley*, 1 C. P. Cooper, 329), *vide infra*.

(*f*) As to loss of a seal, *vide supra*, p. 154.

(*g*) *Gresley on Ev.* 482.

(*h*) *Lord Trimlestown v. Kemmis*, 9 Cl. & Fin. 773, 775.

(*i*) *Rees v. Lloyd*, Wight. 123.

(*j*) *Casamajor v. Strode*, 5 Sim. 87, 98; 2 Myl. & K. 708.

(*k*) *Hart v. Hart*, 1 Ha. 1.

(*l*) *Smith v. Henley*, 1 Ph. 391; and see *Blair v. Ormond*, 1 De G. & S. 428.

(*m*) *Doe v. Coombs*, 6 Jur. 930, Q. B.

Chap. VIII.
grounds of pre-
sumption of
general po-
licy.

plied with, which the Legislature, upon grounds of general policy, has made essential to the validity of an instrument; as, for instance, the enrolment under the Statute of Charitable Uses of the conveyance of an estate to trustees for a charity (*n*).

General
rule of pre-
sumption
between
vendor and
purchaser.

And it seems that, as a general rule between vendor and purchaser, the latter must admit, as presumptions, all matters which, in a Court of Law, the Judge would clearly direct the Jury to presume; but not matters as to which the Judge would leave it to the Jury to pronounce upon the effect of the evidence (*o*).

Evidence of
matters of
fact.

As respects evidence upon matters of fact, (other than documentary facts,) it may, it is conceived, be laid down as a general rule, that a purchaser can, in strictness, require evidence of all facts material to the title from the date at which its regular deduction commences, whether such facts are to be used as positive or negative proofs; that is, of all facts whose existence must be either proved or assumed in order to establish affirmatively the vendor's title, *e. g.*, the heirship of a vendor who claims by descent; and of all facts whose existence must be either proved or assumed in order to establish such title merely by displacing the known or presumptive title of others; *e. g.*, the failure, determination, or release, of some prior estate or incumbrance whose existence is either known or may be presumed as between vendor and purchaser: so, also, he may require a satisfactory explanation of matters which tend to impeach the validity of the abstracted instruments (*p*).

As to what
facts the
purchaser
can require
to be
proved.

(*n*) *Doe v. Waterton*, 3 Barn. & Ald. 149; *Wright v. Smythies*, 10 East, 409.

(*o*) *Emery v. Grocock*, 6 Madd. 54; *Hillary v. Waller*, 12 Ves. see p. 270; see *Baldwin v. Peach*, 1 Y.

& C., Ex. 453, which however was not a case between vendor and purchaser.

(*p*) See *Hobson v. Bell*, 3 Jur. 190: a case of erasures.

But, as a general rule, a purchaser cannot compel the vendor to procure evidence for the purpose of negating mere possibilities, although he may require him to answer, to the best of his knowledge, any relevant question on the subject, and to furnish all evidence in his possession or power; *e.g.*, where a power has been created, and there is no trace of its subsequent execution, the purchaser, although he can require the vendor and his solicitors to state whether to their knowledge or belief the power was ever exercised, and may, perhaps, compel the vendor to make a statutory declaration upon the point, cannot, it is conceived, call for such a declaration by any other person; neither can he require the vendor to search for judgments or other incumbrances; so, neither, where the title commences with a conveyance by a person who conveys as heir at law, can the purchaser require any other evidence of the ancestor's intestacy than such (if any) as is in the vendor's possession (*q*); so, where a vendor is or has been married, the purchaser should inquire whether any settlement was executed on his marriage, and, if this were the case, may require to see the settlement if in the vendor's possession or power; but if the vendor cannot produce it or a copy, the purchaser, it is conceived, must rest content with his assurance or statutory declaration that it did not affect the property in question, although, as a matter of prudence, he should, of course, make inquiries of the wife's family on the subject: in fact, the general rule would seem to be, that, where a *prima facie* title is shown, the purchaser can require no evidence, not in the vendor's possession or power, tending to negative any matter the existence of which may not be presumed either from the contents or nature of the abstracted documents or by the ordinary rules of law or equity.

Chap. VIII.

Negative evidence cannot be required if not in vendor's possession or power, but vendor must, if he can, answer all relevant questions.

(*q*) Sug. 486.

Chap. VIII.

But vendor showing a *primâ facie* title need not answer mere general fishing questions;

And it seems that, where a *primâ facie* title is shown, the purchaser cannot require from the vendor a general explanation of circumstances which the purchaser may consider to be of a doubtful character, but must confine himself to questions directed to the particular defect which he apprehends; where, for instance, a tenant for life with power of appointment exercised such power in favour of his eldest child, and the father and child then concurred in mortgaging the property, (a transaction which is *primâ facie* valid under the authority of *M^cQueen v. Farquhar* (r),) upon a suit for specific performance, and an examination of the vendor upon interrogatories, an interrogatory as to the existence of an underhand agreement that the child should join in the mortgage was not excepted to by his counsel, and appears to have been considered unobjectionable by the Court; but a general interrogatory as to "what was his motive or object in making the appointment" was held to be inadmissible (s).

and need not give explanations in respect of an adverse notice which has not been acted on;

And where an appointment had been made under similar circumstances in favour of an eldest child who joined with the parents in mortgaging the estate, and upon the mortgagee attempting a sale one of the younger children gave notice to the purchaser not to complete, stating that the appointment was a fraud upon the power, but not alleging any fact in support of this assertion, and did not follow up the notice by any proceeding, it was held, that a good title was shown, and that the notice did not oblige the vendor to render any further explanations (t).

but has under special circumstances been required to prove in equity a will already established by a verdict at law.

Where, however, a will had been executed in favour of (*inter alios*) the medical man and solicitor of the testator, and the heir at law disputed the will and brought an ejectment, but a verdict was given for the defendants, it was, nevertheless, held by Lord *Cottenham*, that a purchaser

(r) 11 Ves. 467.

S. 12, 16, & 17.

(s) *Pearse v. Pearse*, 1 De G. &

(t) *Green v. Pulsford*, 2 Beav. 70.

could require the devisees to file a bill to establish the will against the heir (*u*). Chap. VIII.

It has also been held, that the purchaser cannot require the vendor to disclose confidential communications made by him to his solicitors or counsel, or cases laid before counsel respecting the property, although the same were made and prepared merely on behalf of the vendor, and not during a suit, or during a dispute or after the threat of a suit (*v*). Vendor need not disclose confidential communications.

Where the title is derived through an heir who took possession upon the ground of the assumed invalidity of his ancestor's will, which professed to deal with the estate, a purchaser may require the production of the will or evidence of its contents (*w*): so, on a sale by a devisee or party claiming under him, the purchaser may require the production of any subsequent will or codicil, or evidence of its contents (*x*): what the rule may be in cases where a will is known to have existed, but there is nothing to indicate that it purported to affect the property in question, seems to be more doubtful; the purchaser would, no doubt, be entitled to see either the original or the best evidence of its contents which the vendor had the means of supplying (*y*); but if none such could be procured, and, after making inquiries on the subject, no special grounds for supposing the estate to be affected by the will were found to exist, the purchaser, it is conceived, would be obliged to take the title (*z*). Whether he must produce will as negative evidence of heir's *prima facie* title.

And it is the universal practice, where a descent has occurred within a recent period, to require proof of the Ancestor's intestacy as respects the property offered for How far bound to furnish proof of intestacy.

(*u*) *Grove v. Bastard*, 12 Jur. 385; 2 Ph. 619.

(*v*) *Pearse v. Pearse*, 1 De G. & S. 12.

(*w*) *Stevens v. Guppy*, 2 Sim. & St. 439.

(*x*) See, and consider, *Howarth v. Smith*, 6 Sim. 161.

(*y*) See *Cooper v. Emery*, Hayes on Conv. 573, 3rd ed.

(*z*) See the remarks of V. C. Wigram, 2 Ha. 260.

Chap. VIII.

sale, even although no trace of a will appears on the title; how far this can in strictness be insisted on, (except as respects evidence which the vendor may have in his own possession or power,) is perhaps doubtful; the length of time which may be considered sufficient to render such evidence unimportant must depend upon the state of the particular title: where an estate has been repeatedly sold or mortgaged, an interval of thirty or forty years is generally considered satisfactory.

Purchaser cannot require copies of documents produced as negative evidence.

And a purchaser is not entitled to copies of any instruments which are produced merely to negative a possibility, and which he could not have compelled the vendor to produce if they had not been in his possession.

The unsupported statutory declaration of the vendor as to a matter of fact material to the title, and peculiarly within his own knowledge, is not such evidence thereof as a purchaser is bound to accept (*a*).

Want of proof of material facts may be supplied by presumption.

The want of evidence of matters of fact, (other than documentary,) as well as of the existence of documents conferring a title, may, however, be supplied by presumption; and the rule laid down in *Emery v. Grocock* (*b*), as to a purchaser being bound to presume whatever a Judge at Law would clearly direct a jury to presume, applies (it is conceived) generally, although not universally (*c*), to questions of matters of fact between vendor and purchaser (*d*).

Presumption of identity of parcels.

Thus, where, in 1801, an allotment under an Inclosure Act was made to A. in lieu of four acres of common field land, the Court, in 1847, assumed, in the absence of evidence to the contrary, that the four acres formed part of five acres and a half of common land comprised in a deed dated in 1784 (*e*); but the vendor was held bound to make

(*a*) *Hobson v. Bell*, 2 Beav. 17.

(*b*) *Supra*, p. 162; 6 Madd. 54.

(*c*) See Sug. 444.

(*d*) See *Lapham v. Pike*, Rolls,

1831; cited in *Atkinson on Marketable Titles*, 397.

(*e*) *Major v. Ward*, 5 Ha. 604.

inquiries on the subject, and to produce the best evidence in his power of the five acres and a half having formed the only commonable land belonging to the allottee (*f*). Chap. VIII.

So, also, where a person, whose name and description correspond with those of a person previously named in the title, deals with the property in a manner consistent with the supposition of the two being identical, such identity must, in the absence of any reasonable grounds for suspicion, be assumed by a purchaser; this doctrine seems to be supported by a decision in the case of the *Braye Barony* (*g*), where it was held sufficient to identify A. [described in the ancient record, as of B.] with a person named A. in the pedigree, to show *aliunde* that the latter held land in B. Of identity of individuals.

Seisin may be presumed from facts which tend to show that the ancestor or testator acted as if he were the owner of the premises; *e.g.*, the production of leases which he has granted, and which have been followed by possession or payment of rent (*h*), or of a grant of an annuity by a person in possession, and which states that A. B. is the legal owner of the fee (*i*); or the production of receipts for rent given to persons who are proved *aliunde*, (*e.g.*, by the production of land-tax assessments, entries in parochial rate-books, &c.) to have been in the occupation of the premises, or by the declarations of such occupiers that they held of the party in question: but mere personal occupation, although sufficient to raise a presumption of title in Of seisin.

(*f*) *S. C.*, 12 Jur. 476. As to the identity of lands of Ecclesiastical and Collegiate Corporations, see 2 & 3 Will. IV. c. 80; of Enfranchised copyholds, see 4 & 5 Vict. c. 35, s. 21; and of lands charged with tithe commutation rent-charge, see 1 Vict. c. 69, s. 9. Evidence of modern usage is admissible upon the question as to what passed under ancient

grants; *Duke of Beaufort v. Mayor of Swansea*, 3 Exch. R. 413.

(*g*) Cited Hub. on Ev. 465.

(*h*) See *Clarkson v. Woodhouse*, 5 Durn. & E. 412; *White v. Lisle*, 4 Madd. 214; *Welcome v. Upton*, 6 Mee. & W. 536.

(*i*) *Doe v. Coulthred*, 7 Ad. & El. 235.

Chap. VIII. ejectment (*j*), does not appear to have that effect as between vendor and purchaser (*k*).

Strips of waste lying beside an ancient highway or a river are, together with the soil to the middle of the way or river, presumed to belong to the owner of the adjoining inclosed lands (*l*): this presumption however seems to arise only as between such owner and the lord of the manor; and does not apply as between parties deriving title through different conveyances from a former owner of both the inclosed and waste land (*m*); and, even as against the Lord of the Manor, the presumption is rebutted by the circumstance of the strip communicating with a common or other large piece of waste (*n*); or by the fact that other adjoining strips, similarly circumstanced, are held adversely to the landowner (*o*).

Of continu-
ance of
seisin.

And seisin being once proved, or presumed, will be presumed to have continued until the contrary is shown (*p*).

Of intestacy.

Intestacy, also, is a fact which, strictly speaking, does not admit of proof, but is merely matter of presumption; letters of administration are, in the absence of special circumstances, received by conveyancers as raising a sufficient presumption of intestacy; so, a will or probate of a will not affecting the estate in question nor putting the heir to his election, is received for the like purpose.

Of official
appoint-
ments.

So, also, it will be presumed that persons who have acted in official capacities were duly appointed thereto (*q*).

Of person

So, it is conceived, that the statutory presumption that

(*j*) *Doe v. Penfold*, 8 Car. & P. 536.

(*k*) See 13 Ves. 122; Hub. on Ev. 131.

(*l*) 1 Jarm. Conv. by S. 79, and cases there cited; and, in particular, Lord Tenterden's judgment in *Steel v. Prickett*, 2 Stark. 463.

(*m*) *White v. Hill*, 6 Q. B. 487.

(*n*) *Grose v. West*, 7 Taunt. 39.

(*o*) *Doe v. Hampson*, 4 C. B. 267.

(*p*) *Cockman v. Farrer*, Sir T Jones, 182.

(*q*) See, as to Inclosure Commissioners, *Casamajor v. Strode*, 5 Sim. 87, 98; 2 Myl. & K. 708; as to Churchwardens, *Ganvill v. Utting*, 9 Jur. 1081, Ex.

the person last entitled to land was the purchaser, and the stock of descent under the late Inheritance Act, would hold good as between vendor and purchaser (*r*) ; it is observed by Mr. *Hubback*, in his very valuable and elaborate work upon evidence (*s*), that the presumption cannot safely be relied on by the conveyancer, because it might, after completion, be shown in litigating the title that such owner did not purchase but inherited the land, and that the vendor, though the heir of the immediate, was not the heir of the more remote ancestor ; this, no doubt, is true ; but in *every* case of *presumption* there is a like risk of the conclusion being shown to be unfounded : the question is, not whether the purchaser may not require the vendor to make inquiries, and, if possible, procure evidence on the subject ; for to this, as in the allotment case (*t*), he would, no doubt, be entitled (*u*) ; but whether, if such inquiries prove unavailing, the statutory presumption can be got rid of : the question is one of no very general importance, for it can only arise in cases where the commencement of the title is evidenced merely by possession and acts of ownership ; and, even then, if forty years have elapsed since the death, any adverse claim must in all ordinary cases have been barred by the Statute of Limitations.

Chap. VIII.

last entitled
having been
the pur-
chaser and
stock of
descent.

Thus also, (to come to matters of pedigree,) it is a general presumption of law that a child born in wedlock, even a day after the marriage (*v*), is the child of the husband ; and this, although the parties have separated by voluntary agreement (*w*), and the wife be living in adultery (*x*) : but the presumption does not arise in the case of

Presump-
tion in
matters of
pedigree—
of legitima-
cy of child
born in
wedlock.

(*r*) See 3 & 4 Will. IV. c. 106, s. 2.

Margaret, 1 Salk. 123.

(*s*) Page 121.

(*x*) *Bury v. Phillpot*, 2 Myl. &

(*t*) *Major v. Ward*, 5 Ha. 604 ; *supra*, p. 166.

K. 349 ; *Morris v. Davies*, 5 Cl. &

(*u*) Sug. 550.

F. 163 ; *Hargrave v. Hargrave*, 9 Beav. 555 ; *The Queen v. The Inhabitants of Mansfield*, 1 Ad. & E.

(*v*) See Co. Litt. 244. a.

N. S. 444.

(*w*) *Parish of St. George v. St.*

Chap. VIII.

How
rebutted.

a child born after an interval, exceeding the usual period of gestation, since the date of a divorce *à mensâ et thoro* (y); or, it is imagined, since the commencement of the suit in the Ecclesiastical Court; the ordinary presumption is not to be rebutted by circumstances which create only doubt and suspicion; but it may be wholly removed by proper and sufficient evidence, showing that the husband was, 1st, incompetent; 2ndly, entirely absent at the period during which the child must in the course of nature have been begotten, or 3rdly, only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse (z); and it also seems that where the interview between the husband and wife has not been such as to raise an irresistible presumption of the fact of sexual intercourse, the subsequent conduct (a) of the parties may be referred to for the purpose of establishing the fact of non-intercourse; *e. g.*, the circumstance that the wife who was living in adultery concealed the birth of the child, that the husband acted up to his death as if no such child were in existence, and that the adulterer aided in concealing the birth and subsequently reared and educated the child and left it all his property by his will (b): the old doctrine of *quatuor maria* has been long exploded (c).

(y) *Parish of St. George v. St. Margaret*, 1 Salk. 123.

(z) *Per* Lord Langdale, in *Hargrave v. Hargrave*, 9 Beav. 555. His Lordship puts another case, viz., that of "the entire absence of the husband, so as to have no intercourse or communication of any kind with the mother:" but this seems to be an unnecessary extension of what is above stated as the second proposition.

(a) But the evidence and declarations of either the wife or husband are inadmissible; see *Hub. on Ev.*

282, 383; and see 5 Cl. & Fin. p. 221; but see, also, *Hargrave v. Hargrave*, 2 Car. & Kir. 701.

(b) *Morris v. Davies*, 5 Cl. & Fin. 163; *Saye and Sele Barony*, 1 H. L. C. 507; and see *Bury v. Philpot*, 2 Myl. & K. 349; *Clarke v. Maynard*, 6 Mad. 364.

(c) See *Pendrell v. Pendrell*, 2 Stra. 925; and see, on the general subject, *Banbury Peerage Case*, 1 Sim. & St. 153; *Morris v. Davies*, 5 Cl. & Fin. 262; *Hub. on Ev.* p. 393 *et seq.*; *Saye and Sele Barony*, 1 H. L. C. 507.

So, where evidence of marriage cannot be procured, the deficiency may be supplied by presumptions arising either from cohabitation preceded by the usual preliminaries of marriage, or by the conduct and behaviour of the parties during cohabitation and by the general reputation of the fact of marriage; for instance, in the cases of the *Roscommon Earldom* and *Stafford Barony* (*d*), the execution of marriage articles, and the grant of a Royal license to the intended husband to marry his brother's widow, were respectively admitted as raising a presumption that the subsequent cohabitations had been preceded by marriage; so, in the case of the *Saye and Sele Barony* (*e*), the fact of the cohabiting parties having visited with families of respectability was successfully relied on as raising a presumption of marriage; so, in *Lord Ochiltree's case* (*f*), the baptism of a child as if legitimate was held to raise a like presumption: but where, as in Scotland, mere consent will constitute marriage, cohabitation, if in the beginning illicit, will continue to bear that character, unless it be clearly changed by the parties (*g*).

Chap. VIII.

Presump-
tion of
marriage.

Decisions, on such points, in Peerage claims, are, it may be remarked, of higher authority between vendor and purchaser than similar decisions, even by the House of Lords, in adverse claims to property; inasmuch as, the claimant of a Peerage, like a vendor, is required to show not merely a better title relatively to any other, but to show that the title is absolutely and exclusively in himself (*h*).

So, the mere *factum* of marriage being proved, the Law will raise every possible presumption in favour of the existence of circumstances essential to its validity (*i*).

Presump-
tion of
death:

(*d*) Cited in Hub. on Ev. p. 257; and see, in ejectment, *Doe v. Grazebrook*, 4 Ad. & El. N. S. 406.

Hub. on Ev. 249.

(*g*) *Lapsley v. Grierson*, 1 H. L. C. 498, 506.

(*e*) Cited in Hub. on Ev. p. 247.

(*h*) See Hub. on Ev. 63.

(*f*) [A Scotch Peerage case,]

(*i*) *Piers v. Piers*, 2 H. L. C. 331.

Chap. VIII.

as between
vendor and
purchaser:

As between vendor and purchaser, no presumption of death arises from the mere fact of a person having been unheard of for seven years (*j*); nor can any precise period be fixed upon which will raise such a presumption; but every case must depend upon its own particular circumstances; for instance, in a case like that of the *President* steam vessel, never heard of after setting out to cross an open ocean like the Atlantic, the Courts would probably at the end of seven years presume the death of all parties on board, even as between vendor and purchaser (*k*); while they might hesitate, even after a very much longer period, to come to the same conclusion, between vendor and purchaser, in the case of a vessel supposed to have been lost in navigating an ocean thickly studded with islands, like the Pacific.

as between
adverse
claimants
to property.

There have been many decisions upon the above point as between adverse claimants to property; for instance, the mere absence beyond seas of a mortgagor for thirty years without being heard of, was, in an old case, held sufficient to entitle the heir to redeem (*l*); so, as between parties claiming under a will, the death of the legatee has been presumed from absence in America without tidings or reply made to advertisements for twenty-two years (*m*); so, in the recent case of *Cuthbert v. Purrier* (*n*), where a fund was set apart to answer an annuity to a native woman in India, of whom nothing had been heard since 1815, Lord *Cottenham*, in 1837, ordered payment of the principal to the party entitled subject to the annuity, without requiring any security to refund (*o*); so, in *Dowley v. Winfield* (*p*), (an administration suit,) V. C. *Shadwell* presumed

(*j*) Hub. on Ev. 179.

(*k*) See *Sillick v. Booth*, 1 Y. & C. C. 117.

(*l*) *Masten v. Cookson*, 2 Eq. Ca. Abr. 414.

(*m*) *Rust v. Baker*, 8 Sim. 443.

(*n*) 2 Ph. 199.

(*o*) 2 Ph. see p. 200.

(*p*) 14 Sim. 277; and see *Watson v. England*, 8 Jur. 1062; 14 Sim. 28.

the death of a legatee who, when of the age of seventeen, had deserted his ship at one of the Sandwich Islands, and had not been heard of for twelve years : and in a modern case his Honour ordered payment out of Court of a sum of money to the administrators of a person who had gone to America and had not been heard of for seven years (*q*).

As respects the time of death, the presumption, in cases of adverse claims to property, is, that the absent party died at some time within the first seven years after he was last heard of; but there seems to be no settled rule of presumption as to the particular time at which death occurred (*r*) ; this may be presumed from circumstances ; *e. g.*, the fact of the party when last heard of being in a bad state of health, and having arranged to return to his friends in six months (*s*), or the state of weather succeeding the departure from port of a ship which is never afterwards heard of (*t*) ; in *Dowley v. Winfield* (*u*), the Court, in the absence of any special circumstances, presumed that the legatee, who had left his ship in the spring of 1832, died before the death of the testator, which occurred in September, 1833 ; and the legatee's share was paid over to other parties on their giving security to refund : in *Cuthbert v. Purrier* (*v*) the Court ordered the entire accumulations of the annuity, from the time when the annuitant was last heard of, to be paid over to the party entitled subject to the annuity, on his giving his bond to refund.

Presump-
tion as to
time of
death.

So, also, on an adverse claim to property, the Court will, from general circumstances, draw its own conclusions upon

Presump-
tion as to
survivor-
ship.

(*q*) *Dunsmure v. Boulderson*, 5 Jur. 117.

958. (*u*) 14 Sim. 277.

(*r*) *Doe v. Nepean*, 5 B. & Ad. 86. (*v*) 2 Ph. 199, *supra* ; and see

(*s*) *Webster v. Birchmore*, 13 Ves. *Grissall v. Stelfox*, 9 Jur. 890, V. C.

362. K. B. ; *Wilcock v. Purchase*, 9 Jur.

(*t*) *Sillick v. Booth*, 1 Y. & C. C. C. 891, V. C. E.

Chap. VIII. the question of survivorship between parties who are supposed to have perished at about the same time (*v*). ✓

Rules upon,
as between
adverse
claimants,
how far
applicable
as between
vendor and
purchaser.

Such presumptions, however, would not necessarily be made as between vendor and purchaser (*w*) ; and the above cases must be considered as guides, rather than as authorities, for the conveyancer ; in the case of *Dowley v. Winfield*, in particular, the presumption, not only of the time but even of the fact of death, (admitting its propriety for the purpose of enabling the Court to distribute testamentary assets,) would evidently be of an extreme character if made upon a question of title ; the mere fact of a young sailor, who deserted his ship in the Sandwich Islands, not being heard of for twelve years, can scarcely, as a matter of common sense, be considered to raise a stronger presumption of his death, than would the lapse of an equal interval of time in the case of any other person of the same age respecting whose existence no inquiry whatever had been made : in such cases the Court may be supposed to be (perhaps insensibly) influenced not only by a supposition that the party may be dead, but by the feeling that, if alive, he will probably never return to claim the property : it has, moreover, been observed in a recent case, by the same learned Judge who decided *Dowley v. Winfield*, that the old presumption of death from absence, is, owing to the increased facilities of travelling, becoming daily more untenable (*x*).

Presump-
tion of
failure of
issue.

Failure of issue is a negative fact of which no evidence, strictly speaking, is capable of being given ; all that can be done is to prove facts which raise a presumption of the want of issue ; this proof, according to Mr. *Hubback* (*y*),

(*v*) *Sillick v. Booth*, 1 Y. & C. C. C. 121 ; see *Lapsley v. Grierson*, 1 H. L. C. 498 ; see, with reference to the question in the well-known case of *General Stanwix*, (Fearn's Posthumous Works,) *Satterthwaite v. Powell*,

1 Curt. 705.

(*w*) See Sug. 444.

(*x*) See *Watson v. England*, 14 Sim. 28 ; see *Hemming v. Spiers*, 15 Sim. 550.

(*y*) P. 203.

may consist “either of the testimony of living witnesses having the means of knowledge (*z*), the declarations of deceased relatives, or family reputation otherwise established,” and which appears to extend to indirect or circumstantial declarations (*a*), and, (in conveyancing practice,) to include declarations or affidavits by persons acquainted with although not actually members of the family (*b*) ; “or of facts or circumstances irreconcilable with or opposed to the hypothesis that there are any legitimate descendants of the supposed ancestor ;” such as facts which tend to show the celibacy of the party (*c*), the non-mention of issue in wills (*d*) and other documents in which issue, if existing, would naturally be noticed, and the devolution of dignities or property upon the assumption of the want of issue.

Many cases have occurred in which the Court of Chancery has paid out of Court money the title to which depended upon the presumption that females of advanced age were incapable of having issue (*e*) ; fifty-five appears to have been the earliest age at which such a presumption has been acted on, the female being unmarried, and the parties receiving the money being required to enter into their recognizances to refund in the event of her marrying and having issue : in a late case (*f*), where the woman was fifty-eight and unmarried, the V. C. *Shadwell* ordered payment without requiring any recognizance ; we are not aware of any reported case in which a title dependent on

Presumption against aged female having future issue.

(*z*) As to which see the late case of *Hemming v. Spiers*, 15 Sim. 550 (a case between vendor and purchaser) ; and the cases upon Peerage Claims cited Hub. on Ev. p. 204.

(*a*) See cases on Peerage Claims, cited Hub. on Ev. p. 205.

(*b*) *Ibid.* 230.

(*c*) See *Hemming v. Spiers*, 15 Sim. 550.

(*d*) *Hungate v. Gascoyne*, 2 Ph. 25.

(*e*) See *Leng v. Hodges*, Jac. 585 ; *Brown v. Pringle*, 4 Ha. 124, and earlier cases there cited : see the judgment in *Brandon v. Woodthorpe*, 10 Beav. 463, where the practice was admitted, although from other circumstances payment was refused.

(*f*) *Miles v. Knight*, 12 Jur. 666.

Chap. VIII.

such a presumption has been forced upon a purchaser, although, upon general principles, it seems that such a course would, if necessary, be adopted; it being a moral, and not a mathematical certainty, of a good title, which a purchaser can require from a vendor (*g*): the Courts do not appear to have ever acted upon a similar presumption in the case of a male, and there are obvious reasons why the doctrine should not be so extended.

Births,
marriages,
and deaths;
proved by
extracts
from paro-
chial and
General
Registers.

The ordinary evidence of the facts of birth, marriage, and death (*h*), consists of certified extracts from the Parochial Registers, or from the general Register, established by the 6 & 7 Will. IV. c. 86, and amended by the 1 Vict. c. 22: and by declarations as to the identity of the parties; the Parochial Registers are not, as a general rule, evidence of the time or order of birth (*i*), although they may go far to enable the practitioner to form an opinion upon these points; nor do they seem to be evidence of the time of death, except so far as by showing that it must have occurred before the date of the burial, of which they seem to be evidence (*j*); and they are evidence of the time as well as of the fact of marriage (*k*). Under the 6 & 7 Will. IV. c. 86, the birth or death, and not the baptism or burial, is the subject of registration; the date forms part of the entry required by the Act, and certified copies of the entries are to be received as evidence of the birth, death, or marriage, to which the same relate (*l*): it may, however, be doubted whether a purchaser could be compelled to accept a certificate of death as evidence of the fact, unless some sufficient reason were given for the non-production of the certificate of burial (*m*): extracts from non-parochial

(*g*) 2 Atk. 19; see 12 Ves. 252.

(*h*) As to recital of death of *cestui que vie* in renewed Ecclesiastical Lease being evidence, *vide supra*, 154.

(*i*) See 1 Moo. & Rob. 389.

(*j*) Hub. on Ev. 184.

(*k*) *Doe v. Barnes*, 1 Moo. & Rob. 386.

(*l*) Sect. 38.

(*m*) See *Att.-Gen. v. Culverwell*,

registers have long been received by conveyancers as evidence; and by the 3 & 4 Vict. c. 92, the non-parochial registers deposited under the provisions of that Act (*n*), and certified extracts therefrom (*o*), are made evidence in the Courts of Law and Equity. Chap. VIII.

In the absence of evidence of the above description, resort is necessarily had to evidence of a less formal character; such as declarations by members of the family (*p*), whether such declarations be made expressly for the purpose of evidence, or consist of recitals in deeds or wills, statements in pleadings in Chancery, &c. Such evidence is inadmissible in Court during the lifetime of the parties; but, in conveyancing, statutory declarations form the only available means of preserving the testimony of living witnesses, and, after their deaths, become admissible in Court; and where such declaration by relations cannot be procured, conveyancers act upon similar declarations made by strangers who have been acquainted with the family, although such declarations are inadmissible in Court (*q*), unless made contrary to the proprietary or pecuniary (*r*) interest of the declarant: so, statements of pedigree contained in letters, or entries in books, whether How otherwise proved, by declarations, &c.;

R. cited in *Hub. on Ev.* 769; and *Leach v. Leach*, V. C. K. B., 8 Jur. 211; but see *Parkinson v. Francis*, 15 Sim. 160. In *Tomlins v. Tomlins*, 3 Jur. 167, the V. C. of England decided that the Certificate of a District Registrar is not evidence under the Act: in the later case of *Trail v. Kibblewhite*, 10 Jur. 107, the same learned Judge is stated to have acted upon such a certificate; but his attention does not seem to have been directed to the distinction between a District Registrar's, and the Registrar General's certificate.

(*n*) For a list of which see *Hub. on Ev.* p. 772.

(*o*) See sects. 11 and 13.

(*p*) See the remarks of Lord Langdale, upon the value to be attributed to traditionary evidence in Pedigree cases, in *Johnston v. Todd*, 5 Beav. 597.

(*q*) *Johnson v. Lawson*, 2 Bing. 86; *Crease v. Barrett*, 1 Cr. M. & R. 928; *Casey v. O'Shaunessy*, 7 Jur. 1140, P. C.

(*r*) See *Sussex Peerage case*, 11 Cl. & Fin. 85, 112; *Lloyd v. Wait*, 1 Ph. 61.

entries in books, &c.;

Chap. VIII.

old pedi-
grees ;inscriptions,
&c.

religious or otherwise (*s*), are admissible in Court, if the handwriting be proved to be that of a deceased member of the family (*t*) : so also, old statements of pedigree are held admissible, on account of their public exposure to and recognition by the family, even although they cannot be distinctly attributed to any particular member of it : *e. g.*, monumental inscriptions (*u*), a mural inscription in the Parish Church (*v*), coffin plates (*w*), inscriptions upon the walls of the mansion house (*x*), pedigrees hung up in the mansion (*y*), or preserved in the family library (*z*), entries in a family Bible, or, it would appear, in any other book which had been treated by the family as being in the nature of a family register (*a*) ; so, also, a pedigree presented by a third person to a member of the family, and recognised by him, is admissible in proof of the relationship of persons therein described as living, and who might be presumed to be personally known to him, even although the general pedigree be inadmissible by reason of its purporting to be collected from registers, wills, &c., and *history* (*b*) : but a case for the opinion of counsel seems to be inadmissible, as being generally drawn by the solicitor and not by the party himself, and being often framed with

(*s*) See *Herbert v. Tuckal*, Sir T. Raym. 84 ; *Berkeley Peerage case*, 4 Camp. 418 ; *Slane Peerage case*, 5 Cl. & Fin. 24 ; *Tracy Peerage*, 10 Cl. & Fin. 154.

(*t*) As to proof of which, see *The Fitzwalter Peerage*, 10 Cl. & Fin. 193 ; *Tracy Peerage*, 10 Cl. & Fin. 154.

(*u*) See *Peerage Cases*, cited Hub. on Ev. 688 ; and see 10 Cl. & Fin. 154.

(*v*) *Slaney v. Wade*, 1 Myl. & Cr. 338.

(*w*) Hub. on Ev. 693.

(*x*) *Camoy's Barony*, 6 Cl. & Fin. 801.

(*y*) See 1 Myl. & Cr. 356.

(*z*) *Camoy's Barony*, 6 Cl. & Fin. 802 ; and see *Davies v. Lowndes*, 7 Sco. N. R. 141.

(*a*) See 2 Russ. & Myl. 162 ; *Hood v. Beauchamp*, 8 Sim. 26 ; *Slane Peerage case*, 5 Cl. & Fin. 24 ; *Berkeley Peerage case*, 4 Camp. 418.

(*b*) *Davies v. Lowndes*, 7 Sco. N. R. 141, 214.

a view to drive the opposite party to a reference, or for other purposes (c). Chap. VIII.

And it seems probable that such evidence is admissible to prove not only the facts of birth, marriage, and death, but also such collateral matters, *e. g.*, the local derivation of the family, as tend to show the identity of the parties (d). Whether admissible in proof of collateral matters.

All such evidence is generally inadmissible if made during existing (e), or with a view to anticipated (f) litigation or controversy involving the point in question; it seems, however, that the mere fact of the declarant having a distinct object in view in making his declaration, *e. g.*, the prevention of disputes in a family, will not render the declaration inadmissible, although such object can only be gained by using the declaration in evidence (g): and, in a peerage case cited by Mr. *Hubback* (h), a pedigree transmitted by a father to his son with a view to induce him to make a claim to the peerage, which, however, never was made, was held admissible as evidence in favour of a party claiming through an elder branch of the family. Such declarations must be made "ante litem motam"—extent of the rule.

Whether the mere existence of that state of facts which may lead to a controversy is a *lis mota* within the above rule, is doubtful (i): the modern authorities seem to be opposed to such a doctrine; it was held in *Slaney v. Wade* (j) that a copy of an ancient mural inscription was not rendered inadmissible in evidence by reason of its having been made at the time when it was known that, on

(c) *Slane Peerage*, 5 Cl. & Fin. 40.

(d) See *Shields v. Boucher*, 1 De G. & S. 40, and cases there cited; and *Doe v. Davies*, 11 Jur. 607, 10 Q. B. 314; *Lloyd v. Wait*, 1 Ph. 61.

(e) 6 Ir. Eq. R. 348; see Taylor on Ev. 412.

(f) *Slane Peerage*, 5 Cl. & Fin. 23.

(g) See 2 Russ. & Myl. 164; *Berkeley Peerage Case*, 4 Camp. 418;

Slaney v. Wade, 1 Myl. & Cr. 338.

(h) *Airth Earldom*, Hub. on Ev. 668.

(i) See *Davies v. Lowndes*, 7 Sco. N. R. 198, 214; and *Walker v. Earl Beauchamp*, and other cases there referred to; *Slaney v. Wade*, 1 Myl. & Cr. 338; *Monckton v. Att.-Gen.* 2 Russ. & Myl. 147; *Reilly v. Fitzgerald*, 6 Ir. Eq. R. 335.

(j) 1 Myl. & Cr. 338.

Chap. VIII. the death of a tenant for life of the family estates, questions would possibly arise as to who was entitled under a limitation in a will to the testator's right heirs.

Declaration
by party in
the like
interest
admissible.

And a declaration is not rendered inadmissible in evidence by reason of the declarant, and the party relying on his declaration, having been in the same situation with respect to the matter in question (*k*).

Recitals,
when evi-
dence of
pedigree.

And, as against third parties, recitals in a deed are not evidence unless the deed was executed by some disinterested member of the family (*l*): in a case where a conveyance by parties claiming as heiresses of the bodies of two female joint-tenants in tail recited their pedigree, this recital of their title by the then vendors was held to be no evidence against a subsequent purchaser, although the deed was thirty years old; there being nothing to show that the previous possession had been consistent with the pedigree (*m*): but, in an ejectment case, where a person entitled in remainder joined with the tenant for life (who was her relation), in selling the property, and the conveyance recited that she was the daughter of J. D., and the conveyance was executed by the tenant for life, the recital was held by the Court of Queen's Bench to be evidence of the fact, "no dispute having existed, and the parties having done that which they had a right to do if members of the family" (*n*).

Land tax —
redemption
of, how
proved.

Land tax, if not noticed in the agreement, is presumed to be a charge on the property: if stated to be redeemed, its redemption must be shown by the certificate of the Commissioners, the receipt of the Cashier of the Bank of England, and memorandum of registration (*o*).

(*k*) *Monckton v. Att.-Gen.* 2 Russ. & Myl. 157; *Doe d. Tilman v. Tarver*, 1 Ry. & Mo. 141; *Doe v. Davies*, 11 Jur. 607; 10 Q. B. 314.

(*l*) *Slaney v. Wade*, 1 Myl. & Cr. 338; but see the judgment of the

V. C. *contra*, 7 Sim. 614.

(*m*) *Fort v. Clarke*, 1 Russ. 601.

(*n*) *Doe v. Davies*, 11 Jur. 607; 10 Q. B. 314.

(*o*) See 42 Geo. III. c. 116, s. 38.

As to the right of a remainderman to

Tithe, also, is a burden the existence of which is presumed in the absence of agreement: the Law upon the subject is rapidly becoming less important under the provisions of the Tithe Commutation Act (*p*): the Commissioners acting under which have power, in making their award (*q*), to decide all questions as to the existence of any modus, or composition real or prescriptive, or customary payment, or any claim of exemption from or non-liability to payment of tithes (*r*); and their decision, unless reversed on an appeal brought within three calendar months after its being notified in writing to the parties interested, or their agents (*s*), is binding and conclusive; and no further time will be allowed by reason of the benefice becoming vacant, after the commencement, but before the expiration of the three months (*t*); there are exceptions of tithes of fish and fishing, and of mineral tithes, of payments instead of tithes in the City of London, and of permanent rent charges payable in any City or Town by custom or any local Act of Parliament (*u*); but, with these exceptions, all questions as to the existence or amount of liabilities of this description will eventually depend, and do already as respects a great part of the country depend, upon the Commissioners' award (*v*) for the particular district.

Chap. VIII.
Tithes.

Commuta-
tion of,
under late
Act.

Decision of
commission-
ers conclu-
sive if no
appeal.

pay off the representatives of a tenant for life who redeemed the land tax out of his own money, see *Cousens v. Harris*, 12 Jur. 835. As to merger of redeemed land tax, see *Blundell v. Stanley*, 13 Jur. 998.

(*p*) 6 & 7 Will. IV. c. 71; and see supplementary Acts, 7 Will. IV. & 1 Vict. c. 69; 1 & 2 Vict. c. 64; 2 & 3 Vict. c. 62; 3 & 4 Vict. c. 15; 5 Vict. c. 7; 5 & 6 Vict. c. 54; 9 & 10 Vict. c. 73; 10 & 11 Vict. c. 104.

(*q*) And which, if purporting to be sealed with the seal of the Commissioners, is made evidence by s. 2 of 6 & 7 Will. IV. c. 71.

(*r*) 6 & 7 Will. IV. c. 71, s. 45; and see 5 & 6 Vict. c. 54, s. 10.

(*s*) Sect. 46.

(*t*) *Homfray v. Scroope*, 13 Jur. 623.

(*u*) Sect. 90.

(*v*) 6 & 7 Will. IV. c. 71, ss. 52 and 66; and see 2 & 3 Vict. c. 62, s. 8.

Chap. VIII.

Composi-
tion, modus,
or exemp-
tion, how
proved.

Proof of,
how far
facilitated
by 2 & 3
Will. IV. c.
100.

As respects those localities in which the tithe has not yet been commuted, it may be sufficient to state shortly, that a composition real can be established only by direct or presumptive proof of its creation by deed before the 13 Eliz. (*w*) ; and that, before the passing of the 2 & 3 Will. IV. c. 100, a modus could be established only by similar proof of its constant payment from the time of legal memory (*x*) ; and that, to prove an exemption from tithe, it was necessary to show that the land had belonged to one of the greater monasteries, and was held by such monastery discharged from tithe at the time of its dissolution (*y*). By the 2 & 3 Will. IV. c. 100 (*z*), a modus (*a*) or exemption may be absolutely established as against the Crown or Duchy of Cornwall, or any lay person (not being a corporation sole), or any corporation aggregate, whether spiritual or temporal, by proof of payment of the modus, or enjoyment of the land free from tithe, during 60 years next before the time of the demand, and as against any corporation sole, by proof of such payment or enjoyment during two successive incumbencies, (or sixty years, whichever shall be the longer period,) and three years after the appointment and institution or induction of a third incumbent (*b*) ; but the act does not extend to cases where the modus or enjoyment can be referred to an agreement in writing ; and in cases where, at the date of the Act, the

(*w*) See *Estcourt v. Kingscote*, 4 Madd. 140 ; *Dent v. Rob*, 1 Y. & C. Ex. 1.

(*x*) See 1 Mac. & G. 261.

(*y*) 1 Hare, 203 ; and see 1 Mac. & G. 261 ; and *Barnes v. Stuart*, 1 Y. & C. Ex. 119.

(*z*) Amended by 4 & 5 Will. IV. c. 83.

(*a*) A custom for the Lord of a Manor to receive a tenth of all titheable matters in the manor, and to pay a yearly sum to the rector in lieu

of tithe, is not within the Statute ; see *Knight v. Marquis of Waterford*, 15 Mee. & W. 419 ; see 11 Cl. & F. 653.

(*b*) Sect. 1 ; see, as to evidence under this section, *Stamford (Earl of) v. Dunbar*, 9 Jur. 165 ; the shorter period of thirty years allowed by the Act, during which there is only a *primâ facie* and not an absolute claim, does not appear to be material as between vendor and purchaser ; see s. 6 of Act.

tithe were in lease by deed, or subject to a temporary composition in writing, a period of three years is allowed to the tithe owner after the determination of the term of demise or composition (*c*); and the time during which the lands are held by the tithe owner are excluded from the period of computation (*d*). It has, after opposite judicial decisions (*e*), been recently decided by Lord *Cottenham*, C., in conformity with the opinions of eight of the twelve Judges, that in order to bring land within the operation of the above Act for the purpose of claiming an exemption from tithe, it is not necessary to prove its original capacity for exemption, by showing that it belonged to one of the greater monasteries (*f*): the Act, it may be observed, does not prevent a party from pleading a modus from time immemorial and proving it by the same evidence as he might have done before the statute (*g*).

The 3 & 4 Will. IV. c. 27, s. 2, which enacts that no person shall bring an action to recover any land, (which by section 1 includes tithes, unless belonging to a spiritual or eleemosynary corporation sole,) but within twenty years next after the right accrued, has been held by the Court of Exchequer not to prevent the tithe owner from recovering tithes as chattels from the occupier, although none have been set out for twenty years; but to be confined to cases where there are two parties claiming adverse estates in the tithes (*h*).

Tithes, how
affected by
Statute of
Limitations.

Defects in the early title, or in the evidence thereof, are occasionally rendered immaterial by the 2 & 3 Will. IV. c. 71, and 3 & 4 Will. IV. c. 74.

Defects in
title, when
supplied by
Prescription
Act, and
Statute of
Limitations.

(*c*) Sect. 4.

(*d*) Sect 5.

(*e*) See *Salkeld v. Johnston*, 1 Ha. 196; *S. C.*, 2 C. B. 749; and *Fellows v. Clay*, 4 Q. B. 313.

(*f*) *Salkeld v. Johnston*, 1 Mac. & G. 242.

(*g*) *Stamford (Earl of) v. Dunbar*, 9 Jur. 165.

(*h*) *Dean and Chapter of Ely v. Cash*, 15 Mee. & W. 617; but see *Dean and Chapter of Ely v. Bliss*, 5 Beav. 574.

Chap. VIII.

Title under
Prescription
Act to light.

Under the former (commonly known as Lord Tenterden's) Act, a claim to light becomes absolute and indefeasible after twenty years' uninterrupted enjoyment, unless such enjoyment be shown to have been by virtue of some consent or agreement expressly made or given for that purpose by deed or writing; and local customs to the contrary are expressly rendered inoperative (*i*).

To rights of
way and
other ease-
ments ex-
cept light.

Claims of right of way, water, watercourse (*j*), or any other easement, (except light,) become *prima facie* valid after twenty years' uninterrupted enjoyment, and cannot be defeated by mere proof of such enjoyment having commenced at any prior period; but, until forty years' uninterrupted enjoyment, they remain liable to be defeated in any other way in which they might have been defeated before the passing of the Act; *e. g.*, "by proof of a grant, or of a licence, written or parol, for a limited period, comprising the whole or part of the twenty years, or of the absence or ignorance of the parties interested in opposing the claim, and their agents during the whole time that it was exercised" (*k*): after forty years' uninterrupted enjoyment they become absolute and indefeasible, unless proof be given of such enjoyment having been under some consent or agreement expressly given or made for that purpose by deed or writing (*l*); after the end of the twenty years, and before the end of the forty, a grant may still be pre-

(*i*) *Sallers' Company v. Jay*, 3 Ad. & E., N. S. 109.

(*j*) The same law seems to be generally applicable to natural and artificial watercourses; *Magor v. Chadwick*, 3 Per. & Dav. 367; 11 Ad. & E. 571; unless the latter be made for particular and temporary purposes: see, as to mining adits, *Arkwright v. Gell*, 5 Mee. & W. 203; and see also *Wood v. Waud*, 3 Exch. R. 748; as to rights of fishing in

natural watercourses, see *Lamb v. Newbiggin*, 1 Car. & K. 549; the presumption is, that each riparian proprietor has a right to fish the stream in front of his own land: see, on the general subject, the authorities cited in the judgment in *Wood v. Waud*, *ubi supra*.

(*k*) *Per Parke, B.*, 1 C. M. & R. 219.

(*l*) Sect. 2.

sumed by a jury (*m*), notwithstanding that the enjoyment is shown to have originated in an agreement by parol or writing not under seal (*n*).

Chap. VIII.

Claims of rights of common and other profits *à prendre* (*o*), become *prima facie* valid after thirty years' uninterrupted enjoyment, and cannot be defeated by mere proof of such enjoyment having commenced at any prior period; but, until sixty years' uninterrupted enjoyment, they remain liable to be defeated in any other way in which they might have been defeated before the passing of the Act (*p*); after sixty years' uninterrupted enjoyment they become absolute and indefeasible, unless proof be given of such enjoyment having been under some consent or agreement expressly made or given for that purpose by deed or writing (*q*).

To rights of common, &c.

From what has been previously said, it would appear that the period for which a vendor, in order to show a title under the Act, must prove uninterrupted enjoyment, is as follows: viz., twenty years in the case of lights; forty years in the case of ways, waters, watercourses, and other easements (except lights); and sixty years in the case of rights of common and other profits *à prendre*: but, in the second class of cases, where the land or water which is sought to be affected by the easement has, during the period of enjoyment, been held for life, or for any term

Period for which possession must be proved in evidence of title.

(*m*) See 1 C. M. & R. 222.

(*n*) *Dewhurst v. Wrigley*, 1 C. P. Coop. 329.

(*o*) Liberty for grantee, *his heirs and assigns with servants* or otherwise, to enter upon lands, and there to hawk, hunt, fish, and fowl, held to be such; (*Wickham v. Hawker*, 7 M. & W. 63;) and see authorities there cited. A right to dig coal, or other minerals (*Paddock v. Forrester*, 3 Man. & Gr. 903) on another man's land, may be claimed by prescrip-

tion; but an exclusive right to any particular stratum of mineral is a right to land, and must so be claimed, whether the mine be open or unopened (*Wilkinson v. Proud*, 11 M. & W. 33). Whether the right to the *sole and several* herbage and pasturage of land is within the Act seems doubtful; see *Welcome v. Upton*, 5 M. & W. 398, 403.

(*p*) *Supra*, n. (*k*).

(*q*) Sect. 1. See *Welcome v. Upton*, 5 M. & W. 398.

Chap. VIII.

exceeding three years, the reversioner, notwithstanding the expiration of the forty years, has a period of three years from the determination of the particular estate in which to resist the claim (*r*) ; so that unless, (as can seldom be the case,) the vendor can show the title to the land or water, he cannot, by evidence of enjoyment, make a good title to the easement (*s*) ; and enjoyment which gives no title as against the reversioner, gives no title as against the owner of the particular estate (*t*). As respects the easement of light, however, the case seems to be different ; there being no similar reservation in the statute of the rights of reversioners.

Enjoyment
must have
been unin-
terrupted
and as of
right.

In all the above cases, (except that of a claim to light,) the enjoyment must have been uninterrupted (*u*), “as of right,” and must have been subsisting within, at most, a year before the commencement of the action in which it is relied on (*v*) : the claim, therefore, may be defeated by showing that, for the whole or a part of a period relied on, the enjoyment was by parol licence, or was exercised by stealth or without the knowledge of the parties interested in opposing the claim (*w*), or that the party exercising it was himself, during all or any part of such period, entitled to the possession of the property sought to be affected (*x*) : and in cases falling under sections 1, 4, and 7 of the Act,

(*r*) Sect. 8.

(*s*) See *Bright v. Walker*, 1 C. M. & R. 219.

(*t*) *S. C.* ; and note, that as respects the *primâ facie* title which is gained by a thirty or twenty years' possession, under sects. 1 and 2 of the Act, the time during which there may have been any disability, or a subsisting life estate, is altogether excluded by sect. 7.

(*u*) *Onley v. Gardiner*, 4 M. & W. 500.

(*v*) See *Parker v. Mitchell*, 11 A.

& E. 788 ; and *Flight v. Thomas*, 8 Cl. & Fin. 231.

(*w*) See *Bright v. Walker*, 2 C. M. & R. 219 ; *Tickle v. Brown*, 4 Ad. & E. 369 ; *Partridge v. Scott*, 3 M. & W. 220.

(*x*) *Onley v. Gardiner*, 4 M. & W. 500 ; *Clayton v. Corby*, 2 Ad. & E. N. S. 813 ; *Clay v. Shackera*y, 2 Moo. & R. 244. As to the non-extinguishment of a necessary easement by unity of seisin, see *Pheysey v. Vicary*, 16 M. & W. 484.

an enjoyment, as of right, may be proved, by showing enjoyment for several periods, amounting together to the statutory time; and that during the entire intervals between such periods, and between the last of them and the action, (if such interval intervened,) the estate sought to be affected was in the hands of a tenant for life or for years exceeding three years (*y*).

But, as respects the easement of light, the mere fact of uninterrupted enjoyment for twenty years, otherwise than by consent given by deed or writing, confers an absolute title; the enjoyment need not be as of right; so that proof of a parol licence is immaterial (*z*); nor does the existence of disabilities or particular estates make any difference: it has, however, been recently determined by the Court of Exchequer, that the enjoyment of the access of light must have been in the character of an *easement*, distinct from the enjoyment of the land sought to be affected; so that sixty years' enjoyment of lights looking out upon a garden which the owners of the house had held during that period, as tenants from year to year, was held insufficient to confer a title (*a*).

Except in cases of light.

By interruption, it may be observed, is meant an adverse obstruction, and not a mere discontinuance of user (*b*); but the question, whether a discontinuance was voluntary or otherwise, is one for a jury (*c*); so that, as between vendor and purchaser, it would seem to be necessary to give evidence of (so near as may be) continuous user. It has been recently decided by the House of Lords (*d*), confirming the decisions of the Courts of Queen's Bench and

Interruption—what it is.

(*y*) *Clayton v. Corby*, 2 Ad. & E. R. 552.
N. S. 813.

(*b*) *Carr v. Foster*, 3 Ad. & E.,

(*z*) *Mayor, &c. of London v. Pew-* N. S. 581.

terers' Company, 2 Moo. & R. 409;

(*c*) *S. C.*

Flight v. Thomas, 11 Ad. & E. 688,
see p. 695.

(*d*) *Flight v. Thomas*, 8 Cl. & Fin.
231.

(*a*) *Harbidge v. Warwick*, 3 Exch.

Chap. VIII. Exchequer Chamber, that, under the 4th section of the Statute, which provides that no act shall be deemed an interruption unless submitted to or acquiesced in for one year, a party who has uninterruptedly enjoyed or used the easement or right for any period exceeding one year short of the term which would be sufficient to confer a statutory title, can, upon being disturbed in his enjoyment or user at any time within the last year of the statutory term, at once claim the benefit of the statute.

Statute of
Limitations,
3 & 4 Will.
IV. c. 27.

By the 3 & 4 Will. IV. c. 27, the time within which proceedings can be commenced, at Law or in Equity (*e*), for the recovery of any *land* (*f*), (which expression includes all corporeal hereditaments, and also tithes (*g*), except tithes belonging to a spiritual or eleemosynary corporation sole,) and any share, estate, or interest therein, or of any *rent*, (which includes heriots, and all services and suits for which a distress may be made, and all annuities and periodical sums of money charged upon or payable out of any land, except moduses or compositions belonging to a spiritual or eleemosynary corporation sole (*h*),) is restricted to a period of twenty years (*i*), or, in case of continuous disabilities (*j*), forty years, from the

All actions,
&c., to be
commenced
within at

(*e*) Filing of bill, not service of subpoena, is the commencement of suit; *Coppin v. Gray*, 1 Y. & C. C. C. 205; *Morris v. Ellis*, 7 Jur. 413; *Purcell v. Blennerhassett*, 3 J. & L. 24; but see *Att.-Gen. v. Hall*, 11 Pri. 760: as to suit commenced and then abandoned, see *Bampton v. Birchall*, 5 Beav. 67, and see *Rocke v. Cooke*, 12 Jur. 5.

(*f*) Or title deeds; see *Dean and Chapter of Wells v. Doddington*, 2 Coll. 73.

(*g*) *I. e.*, as between parties claiming adverse estates therein, but not as between tithe-owner and terre-te-

nant; *Dean and Chapter of Ely v. Cash*, 15 M. & W. 617; but see *Dean and Chapter of Ely v. Bliss*, 5 Beav. 574.

(*h*) But not rent reserved on a demise, as between tenant and reversioner; *Grant v. Ellis*, 9 M. & W. 113.

(*i*) Sects. 2 and 24.

(*j*) See sects. 16, 17, 18, and 19. The 19th sect., which provides that Scotland, Ireland, and the adjacent islands are not to be considered beyond seas, applies to cases of residence in Ireland, &c., before the passing of the Act, if the controversy

time at which the right to proceed for the recovery of such land or rent first accrued to the plaintiff, or to the party through whom he claims (*k*).

Chap. VIII.

least forty years from accrual of right to sue.

The 3rd section of the Act fixes the time at which, in certain specified cases, the right shall be deemed to have accrued; these cases, however, are put merely by way of illustration, and not with the view of limiting the operation of the 2nd section (*l*); the general principle seems to be, that when a party has been in possession or receipt of the profits of the land, or in receipt of rent, the right accrued at the time when he last held such possession or received such profits or rent (*m*); while in the case of a party who has never had such possession or receipt, the right accrued at the time when he first became entitled (whether by descent, alienation, falling in of a remainder or reversion, forfeiture, devise (*n*), or otherwise) to enter into such possession or receipt. A mortgagee may, however, recover the mortgaged land at any time within twenty years after the last payment of principal or interest, notwithstanding twenty years or upwards may have elapsed since his right to enter accrued under the mortgage deed (*o*).

Right when deemed to have accrued in certain cases.

General rule.

And as against an administrator time runs from the death of the intestate (*p*).

Administrator claims as from death.

do not arise until after the passing of it: *Ex parte Hasell*, 3 Y. & C. 617.

(*k*) See sect. 1; and *Doe v. Edmonds*, 6 M. & W. 295.

(*l*) See *James v. Salter*, 4 Sco. 168.

(*m*) *Owen v. De Beauvoir*, 16 M. & W. 547.

(*n*) See *James v. Salter*, 4 Scott, 168, 180.

(*o*) See 7 Will. IV. & 1 Vict. c. 28. In default of payment, time runs from date of mortgage deed, if

there is no provision for quiet enjoyment by the mortgagor, until default in payment; *Doe d. Roylance v. Lightfoot*, 8 M. & W. 553: as to whether the mortgagee's *prima facie* absolute title by twenty years' possession is defeated by his having kept accounts of the rents received by him, and otherwise treated and considered himself as mortgagee, see *Baker v. Watton*, 14 Sim. 426. As to the case of an annuitant, see *Searle v. Colt*, 1 Y. & C. C. C. 36.

(*p*) Sect. 6.

Chap. VIII.

Express
trust—right
accrues at
date of con-
veyance to
a purchaser.

Charities,
whether
within the
Act.

Fraud

Tenancy at
will.

And, in the case of an express trust (*q*), the right does not accrue until a conveyance has been made to a purchaser for valuable consideration, and then only as against such purchaser and persons claiming under him (*r*); whether or no a charitable trust is within this provision, or whether, as formerly, time is no bar when the purchaser has notice, seems to be doubtful (*s*): the provision does not seem to apply to a mere voluntary trust for payment of debts when the creditors are not in fact *cestuis que trust*, so as to be entitled to enforce the trusts (*t*): in cases of fraud, time does not begin to run until the fraud was, or with reasonable diligence might have been, discovered (*u*); but this is not to affect a *bonâ fide* purchaser for valuable consideration without notice of, or reason to believe in, the commission of the fraud.

The 7th section enacts, that the right of a person entitled subject to a tenancy at will is to be deemed to

(*q*) See *Francis v. Grover*, 5 Ha. 39; *The Commissioners of Donations v. Wybrants*, 2 J. & Lat. 182; *Hughes v. Kelly*, 2 Con. & L. 223; *Blair v. Nugent*, 3 J. & Lat. 661; *Ward v. Arch*, 12 Sim. 472; and *Gough v. Bult*, 12 Jur. 859: as to difference between a charge and a trust for payment of a sum of money out of real estate. Purchaser's liability for purchase-money is not an express trust: *Toft v. Stephenson*, 7 Ha. 1; a constructive trust may be barred by long acquiescence; *Ex parte Hasell*, 3 Y. & C. 617.

(*r*) Sect. 25; *Att.-Gen. v. Flint*, 4 Ha. 147.

(*s*) See 4 Ha. 153—155; and see, *Att.-Gen. v. Kerr*, 2 Beav. 420; *Att.-Gen. v. Brettingham*, 3 Beav. 91; in neither of which cases was the statute relied on; and see, 1 Dru. & W. 288, where Sugden, C., was of

opinion that the Act did not extend to charities; and see, 2 Dru. & W. 69; but in *The Commissioners of Charitable Donations v. Wybrants*, 2 J. & Lat. 182, the same learned judge held, although the opinion was extrajudicial, that charitable trusts were within the Act.

(*t*) *Evans v. Bagwell*, 2 Con. & L. 612; and query, whether the 25th section applies to cases which fall within the 40th and 42nd sections; *Ibid.* p. 618.

(*u*) Sect. 26, and *Lewis v. Thomas*, 3 Ha. 26. In the case of a firm, it has been held that the fraud of one member prevents time, under the 3 & 4 Will. IV. c. 42, from running in favour of his co-partners, although innocent of, and deriving no benefit from, the fraud: *Blair v. Bromley*, 2 Ph. 354.

have first accrued, either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined; but it provides that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will within the meaning of this clause to his mortgagee or trustee (*v*). In cases of express trust, a *cestui que trust* whose possession is consistent with the trust is, for general purposes, tenant at will to his trustee (*w*), and the object of the above provision seems to have been, to preserve the legal estate of the trustee, which, under the old law, was secured by the necessity that possession should be adverse in order to take away the right of entry: however, in a recent case of *Doe d. Jacobs v. Phillips* (*x*), the Court of Queen's Bench seem to have considered the trustee of a term was barred by the possession of his *cestui que trust*: the opinions expressed upon this point were, however, extra-judicial; for, admitting the *cestui que trust* to have been tenant at will, the trustee before bringing the action should have determined the tenancy by notice, which he had not done (*y*): but the Court of Common Pleas has since (*z*) refused to follow the dicta in *Doe v. Phillips*. Where the tenancy determined before the passing of the Act, the right of entry is to be considered as having accrued at the time of such determination (*a*);

(*v*) A purchaser let into possession before completion is *primâ facie* a tenant at will within this clause; *Doe d. Stanway v. Rock*, 4 Man. & G. 30.

(*w*) See 1 Jarm. Conv. by S. 28; Sug. 610.

(*x*) 10 Q. B. 130.

(*y*) As to what conduct amounts to an admission of a subsisting tenancy at will, see *Doe d. Groves v. Groves*, 10 Q. B. 486.

(*z*) *Garrard v. Tuck*, 13 Jur. 871; and see *Young v. Lord Waterpark*, 10 Jur. 1, L. C.

(*a*) *Doe v. Thompson*, 6 Ad. & E. 721; *Doe d. Evans v. Page*, 5 Q. B. 767; 1 Dav. & M. 601; *Doe v. Bold*, 11 Q. B. 127; as to what amounts to a determination of a tenancy at will, see *Doe d. Bennett v. Turner*, 7 M. & W. 226; *S. C.* 9 M. & W. 643; *Doe d. Goody v. Carter*, 9 Q. B. 863.

Chap. VIII. but where the tenancy was subsisting when the Act came into operation, the right is barred by the lapse of twenty years from the end of one year after the commencement of the tenancy (*b*).

Tenancy
from year to
year.

The right of a person entitled subject to a tenancy from year to year or other period, without any lease in writing, is to be deemed to have accrued at the end of the first year or other period, or last receipt of rent, which shall last happen (*c*). It has been held, that the performance of a service for which distress might have been made, *e. g.*, sweeping the church and tolling the bell, amounts to payment of rent within the meaning of this section (*d*).

Right of
action saved
by acknow-
ledgment of
title;

or receipt of
rent or
services.

The acknowledgment in writing of title, given to the person entitled or his agent by the person in the actual possession or receipt of the profits of the land or receipt of the rent, is equivalent to such possession or receipt by the person so entitled (*e*): as between the landlord and tenant the receipt of rent is equivalent to the receipt of the profits of land (*f*); but the performance of a service for which no distress can be made, *e. g.*, keeping up a grindstone on the land for the use of the parties beneficially interested (*g*), does not prevent the Statute from running in favour of the occupiers.

Possession

The possession, &c., of one coparcener, joint-tenant, or

(*b*) *Doe d. Dayman v. Moore*, 9 Q. B. 555; *Doe d. Goody v. Carter*, 9 Q. B. 863.

(*c*) Sect. 8.

(*d*) *Doe d. Edney v. Benham*, 7 Q. B. 976; as to the 8th section being retrospective, see *Doe d. Jukes v. Sumner*, 14 M. & W. 39.

(*e*) Sect. 14. See, as to what is a sufficient acknowledgment, *Doe v. Edmonds*, 6 M. & W. 295; *Trulock v. Robey*, 12 Sim. 402; *Holland v. Clark*, 1 Y. & C. C. C. 151; *Fursdon v. Clogg*, 10 M. & W. 572; *In-*

corporated Society v. Richards, 1 Dru. & W. 258; *Lewis v. Thomas*, 3 Ha. 26, 34; *Lucas v. Dennison*, 13 Sim. 584. Acknowledgment by trustee, in trust to sell for payment of debts and subject thereto in trust for A., or by his agent, is sufficient: *Lord St. John v. Boughton*, 9 Sim. 219; and see *Blair v. Nugent*, 3 J. & L. 674.

(*f*) Sect. 35.

(*g*) *Doe d. Robinson v. Hinde*, 2 Moo. & R. 441.

tenant in common, is not to be considered as the possession, &c., of any other (*h*); nor is the possession, &c., of the younger brother, or other relation of an heir, to be considered the possession, &c., of such heir (*i*).

Chap. VIII.

of one joint-owner does not save the right of another.

The right of a remainderman or reversioner accrues when his estate falls into possession (*j*); and this, although he may have waived a previous forfeiture (*k*); and although, in the case of a reversioner, he, or the person through whom he claims, may have been in possession previously to the creation of the particular estate (*l*): but where the same person who is entitled to the particular estate, is also entitled to the immediate beneficial reversion, time will run against both estates even although there may be no merger (*m*). Where rent amounting to 20*s. per annum* or upwards, reserved by a lease in writing, is received by a wrongful claimant, no fresh right accrues to the reversioner upon the determination of the lease (*n*); but, in order to bar the reversioner, there must be actual receipt of the rent by a wrongful claimant; its mere retention by the tenant is immaterial (*o*): the existence of a lease containing general words sufficient to comprise the property in question, but which was not intended to comprise it, and has not been acted on as respects such property, would not, it appears, prevent the Statute from running (*p*): and where the

Estates in remainder, &c.—when time begins to run against.

(*h*) Sect. 12: this clause is retrospective: see *Culley v. Doe d. Taylerson*, 3 Per. & Dav. 539; 11 Ad. & E. 1008; *Doe d. Holt v. Horrocks*, 1 C. & K. 566; *Doe d. Daniel v. Woodroffe*, 13 Jur. 1013, H. L.

(*i*) Sect. 13.

(*j*) Sect. 3: see *Duke of Leeds v. Earl Amherst*, 2 Ph. 125.

(*k*) Sect. 4.

(*l*) Sect. 5; and see *Doe d. Curzon v. Edmonds*, 6 M. & W. 295.

(*m*) *Doe d. Hall v. Mouldsdale*, 16 M. & W. 689.

(*n*) Sect. 9: this provision is retrospective; see *Doe d. Angell v. Angell*, 9 Q. B. 328; see this case, also, p. 355, as to the construction of the word "rent" throughout the 9th sect.

(*o*) *Doe d. Davy v. Oxenham*, 7 M. & W. 131; *Chadwick v. Broadwood*, 3 Beav. 308; see, however, *Ex parte Jones*, 4 Y. & C. 466: as to rents of mines reserved *in specie*, see *Denys v. Shuckburgh*, 4 Y. & C. 42.

(*p*) See *Dean and Chapter of Ely v. Bliss*, 5 Beav. 574.

Chap. VIII. right of a person to an estate in possession is barred, the right of such person, and of all parties claiming under him, to any future estate, is also barred, unless the land or rent is in the mean time recovered by some person claiming in right of some intervening estate (*q*): where there was a limitation to husband and wife for their joint lives, with remainder to the heirs of the husband, who became bankrupt, the last limitation was held to be a future estate within the meaning of this section; and the possession of the land by the surviving wife, although taken without legal proceedings, saved the right of the assignee of the husband (*r*).

Married woman, when barred.

When a married woman and her husband join in a conveyance of her estate by an assurance which for want of a Fine or Statutory Acknowledgment is not binding on her, time will begin to run against her and her heirs only from the death of the husband, (if tenant by the curtesy,) or from her death in his lifetime (if they have no inheritable issue (*s*)); but where there is no conveyance binding on the husband, but a mere abandonment of possession by husband and wife, it has been held that time will run against her from the date of such abandonment (*t*).

Remainders expectant on an estate tail are barred when estate tail is barred.

By the 21st section it is enacted, "That when the right of a Tenant in Tail of any land or rent to make an entry or distress, or to bring an action to recover the same, shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress, or action shall be made or brought by any person claiming any estate, interest, or right which such

(*q*) Sect. 20; and see *Doe d. Hall v. Mouldsdale*, 16 M. & W. 689—698.

(*r*) *Doe d. Johnson v. Liversedge*, 11 M. & W. 517.

(*s*) *Jumpson v. Pitchers*, 13 Sim. 327; see Sug. 631; and *Neesom v. Clarkson*, 2 Ha. 163.

(*t*) *Doe v. Bramston*, 3 Ad. & E. 63.

Tenant in Tail might lawfully have barred :” and the 22nd section, in effect, provides that time which has commenced running against a deceased Tenant in Tail, shall be counted as against persons claiming in respect of any estate, &c., which he “might lawfully have barred.”

Chap. VIII.

Time runs against the estate tail and the remainders.

The expresssion in each of these two sections “might lawfully have barred,” seems to require personal legal capacity on the part of the tenant in tail to bar the remainders ; from which this singular result would seem to follow, viz., suppose the right of a tenant in tail to accrue in possession when he is one year old, and that he attains twenty-one and dies the next day under no personal incapacity, the Statute would run against remaindermen as from the time when his right first accrued ; but suppose him to die just before attaining twenty-one, or to attain twenty-one an idiot or lunatic, and so to continue until his death, in such a case it would seem that remaindermen would be in no way affected by the above sections of the Act. This construction, if it be a correct one, must, in many cases where land has been brought into settlement, materially interfere with the beneficial operation of the Statute upon titles.

But tenant in tail must have been *sui jures*, *semble*.

The 23rd section has been a good deal discussed in the profession : according to Sir *E. Sugden* its effect is, “that where a tenant in tail executes a deed enrolled under the 3 & 4 Will. IV. c. 74, which for want of the consent of the Protector operates only to create a base fee, under which possession is obtained, the title will become good against those in remainder at the end of twenty years from the period when the tenant in tail, or his issue, could, without the consent of any third person, have barred the remainders over under the 3 & 4 Will. IV. c. 74” (*u*) ; but it is not clear that the section has not a retrospective operation (*v*).

Base fee—when to become a fee simple.

(*u*) Sug. 632.

(*v*) See 1 Jarm. Conv. by S. 32.

Chap. VIII.

Here, it may be observed, the same question arises as to the necessity for personal legal capacity on the part of the tenant in tail or his issue to execute a disentailing conveyance, as well as the nonexistence of a protector, at the time when the statute is to begin to run.

And in the opinion of Sir *E. Sugden*, base fees which were created before the passing of the 3 & 4 Will. IV. c. 27, are, as a general rule rendered unassailable by the 36th section of the Act (*w*).

Equity of redemption, when to be barred.

Acknowledgment.

The right of a mortgagor to redeem (*x*) is to be barred at the end of twenty years from the mortgagee taking possession, or last giving a written acknowledgment of title; the acknowledgment must be given to the mortgagor or some person claiming his estate, or the agent of such mortgagor or person; and the section has been held to be retrospective; so that where, before the Act, a mortgage had been twice transferred, as such, by deeds to which the mortgagor was no party, and no acknowledgment of the equity of redemption had been given to him for seventeen years before the passing of the Act, these years were counted against him upon his subsequently filing a bill to redeem (*y*): an acknowledgment given to one of several mortgagors, or representatives of a mortgagor, operates in favour of all; but an acknowledgment by one of several mortgagees, or representatives of a mortgagee, does not affect the proportionate interests of the others (*z*): if a mortgagee while in possession is himself entitled to such possession in respect of a life or other limited interest in, or as a tenant in common of, the equity of redemption, the period for which he is so entitled will not be counted against the parties entitled, in remainder, or together with him, to the equity of redemption (*a*).

If mortgagee is entitled to possession as being interested in equity of redemption, time does not run.

(*w*) Sug. 634.

(*x*) See sect. 28.

(*y*) *Batchelor v. Middleton*, 6 Ha. 75.

(*z*) Sect. 28.

(*a*) *Raffety v. King*, 1 Keen, 601;

Tull v. Owen, 4 Y. & C. 201; *Hyde v. Dallaway*, 2 Ha. 528; 2 Ph. 303.

No spiritual eleemosynary corporation sole is to recover any lands or rents but within two successive incumbencies and six years, or sixty years, (whichever be the longer period,) from the time when the right accrued (*b*).

Chap. VIII.

Time allowed for action, &c., by spiritual or eleemosynary corporation sole.

No advowson is to be recovered, or right of presentation enforced, but within three successive adverse incumbencies, or sixty years, (whichever be the longer period,) reckoning therein incumbencies by lapse but not incumbencies after promotions to Bishoprics (*c*); and a patron claiming in respect of an estate in remainder on an estate tail, is, for the purposes of the statutory bar, to be considered as claiming through the person entitled to such estate tail (*d*): successive adverse incumbencies extending over one hundred years form an absolute bar, unless the benefice has been since enjoyed under a rightful presentation; and in calculating this period a presentation adverse to the owner of a particular estate is considered adverse to remaindermen (*e*).

For recovery of advowson or right of presentation.

No money charged upon, or payable out of any land or rent, nor any legacy (*f*), is to be recovered but within twenty years next after a present right to receive the same (*g*) shall have accrued to some person capable of giving a discharge for or release of the same; unless there has been some interim payment in respect of principal or interest, or acknowledgment of right given in writing (*h*);

For recovery of money charged on land.

(*b*) Sect. 29.

(*c*) Sects. 30 and 31.

(*d*) Sect. 32.

(*e*) See sect. 33.

(*f*) Which includes a residue or share of a residue; see *Christian v. Devereux*, 12 Sim. 264; see also *Phillipo v. Munnings*, 2 Myl. & C. 309; *Sheppard v. Duke*, 9 Sim. 567; *Prior v. Horniblow*, 2 Y. & C. Ex. 200; *Adams v. Barry*, 2 Coll. 290. Under the 36 Geo. III. c. 52, s. 27,

a verified copy of the entry in the Stamp Office book, of payment of the duty on a legacy, is evidence of payment of the legacy; *Harrison v. Borwell*, 10 Sim. 380.

(*g*) See *Faulkner v. Daniel*, 3 Ha. 212. Legatees, whose legacies are charged on land subject to prior charges, held not to be affected by lapse of time while any prior charge subsisted.

(*h*) Sect. 40.

Chap. VIII. from the above period must be excluded the time (if any) during which the person entitled to the charge has been also entitled to the possession of the land or rent (*i*) : and where a term was vested in trustees, in trust to raise portions for younger children, and subject thereto the estate was limited in strict settlement, it was held by Lord *Lyndhurst*, C., that the possession of the estate by the parties in reversion was consistent with the trust, and that the statutory bar did not apply (*j*).

What suits
are consid-
ered to be
such.

It has been held that a foreclosure suit is a suit for the recovery of money charged upon land, within the 40th section (*k*) : so, also, is a vendor's suit for the recovery of his unpaid purchase-money (*l*) : it seems probable that the statutory bar would not apply, where the bill was filed before, although no decree was made until after, the passing of the Act (*m*).

For reco-
very of
periodical
payments.

Arrears of dower (*n*), rent, or interest, are not recoverable for more than six years (*o*), unless a prior incumbrancer has been in possession within one year before the commencement of the proceedings for the recovery of such arrears, in which case they may be recovered for the whole period of such possession (*p*) ; that is, if the prior incumbrance affect the estate or interest upon which the subsequent incumbrance is a charge (*q*). It was held by Sir *J. Wigram*, V. C., that if the interest on a mortgage debt is secured by bond or covenant, arrears for twenty years

(*i*) *Burrell v. Lord Egremont*, 7 Beav. 205.

(*j*) *Young v. Lord Waterpark*, 13 Sim. 204 ; S. C. on appeal, 10 Jur. 1.

(*k*) See *Dearman v. Wyche*, 9 Sim. 570 ; and *Du Vigier v. Lee*, 2 Ha. 334 ; but see *contra*, *Wrixon v. Vise*, 2 C. & L. 138.

(*l*) *Toft v. Stephenson*, 7 Ha. 1.

(*m*) *Ravenscroft v. Frisby*, 1 Coll. 16.

(*n*) *Bamford v. Bamford*, 5 Ha. 203.

(*o*) Sects. 41 and 42 ; *Francis v. Grover*, 5 Ha. 39 ; the expression "rent," includes a fee-farm rent ; *Humfrey v. Gery*, 7 C. B. 567.

(*p*) Sect. 42.

(*q*) *Vincent v. Goring*, 1 J. & L. 697.

can be recovered as against the mortgaged estate (*r*) ; but this decision, which was opposed to the opinion of Sir *E. Sugden* (*s*), has been overruled (*t*) : the position of the grantee of an annuity charged on land, which has been duly paid, where the grantor has retained possession of the estate without acknowledgment of title, for a period exceeding the statutory limit, seems to be doubtful (*u*).

It has been decided, in Ireland, by *Sugden*, C., that a purchaser under a decree of the Court can be compelled to accept a title depending upon adverse possession, verified, like any other fact, in the Master's Office (*v*) ; and the general principle would probably be maintained by the English Courts in a suit for specific performance. Its beneficial application, as between vendors and purchasers, is, however, in the case particularly of missing instruments, materially affected by the difficulty which exists of determining the time when the right of action may have accrued to the supposed adverse claimants : for instance, where forty years have elapsed since the death intestate of a former owner seised in fee simple in possession, the statute may be safely relied on as against the claim of any latent heir, as his right of action must have accrued at the death : but if the intestacy itself be in dispute, and there is reason to apprehend the existence of a will whose contents are unknown, here the statute is evidently a very slight protection ; as limitations may have been created under which a right of action may exist for an indefinite period.

Purchaser compelled to accept title depending on Statute of Limitations.

(*r*) *Du Vigier v. Lee*, 2 Ha. 326.

(*s*) *Harrison v. Duignan*, 2 Dru. & W. 295 ; *Hughes v. Kelly*, 3 Dru. & W. 482.

(*t*) *Hunter v. Nockolds*, 1 Mac. & G. 640 ; *Humfrey v. Gery*, 7 C. B. 567.

(*u*) See *Searle v. Colt*, 1 Y. & C. C. C. 36 : payment by executors and trustees in possession has been held

binding as against the *cestui que use* : *Francis v. Grover*, 5 Ha. 39.

(*v*) *Scott v. Nixon*, 3 Dru. & W. 388 : the verification was merely by affidavit ; but the Court expressly stated that the purchaser might, had he pleased, have insisted on a regular examination of witnesses : see p 402.

Chap. VIII.

Possession
under the
Act, bars the
right, and
not the re-
medy only.

Possession for a time exceeding the statutory limit, bars not only the remedy, but also the right of the original owner (*w*) : the effect of the Act being to make a Parliamentary Conveyance of the land to the person in possession, after the statutory period has elapsed (*x*) ; but possession, in order to transfer a valid title to any particular individual, must have been either by the same person, or by several persons claiming one from another : *e. g.*, if twenty persons, unconnected with each other, had been in possession, each for one year consecutively, for twenty years, it would be impossible to say to which of the twenty persons the Act had transferred the title (*y*). Rent payable out of land is extinguished by its nonpayment during the statutory period ; and time runs from the last actual receipt (*z*).

Adverse
possession
as against
the Crown.

As to the title which may be acquired as against the Crown, and the Crown's Grantees, by adverse possession, it may be sufficient to refer to the Acts of 21 Jac. I. c. 14, and 9 Geo. III. c. 16 (*a*). The Acts of 2 & 3 Will. IV. c. 71, and c. 100, seem to be binding on the Crown (*b*).

(*w*) See s. 34 : *Scott v. Nixon*, 3 Dru. & W. 388 ; *Burroughs v. McCreight*, 1 J. & L. 290.

(*x*) *Per Parke, B.*, 14 M. & W. 42.

(*y*) *Doe d. Carter v. Barnard*, 13 Jur. 915 ; see judgment.

(*z*) *Owen v. De Beauvoir*, 16 M. & W. 547. As to the right of a

lessor, at the expiration of the term, to encroachments made by the tenant during the tenancy, see *Doe d. Lloyd v. Jones*, 15 M. & W. 580, and cases cited.

(*a*) And see 1 Jarm. Conv. by S. 52 ; and *Doe v. Roberts*, 13 M. & W. 520.

(*b*) See s. 1.

CHAPTER IX.

Chap. IX.

AS TO THE PRODUCTION AND EXAMINATION OF THE DEEDS.

1. *As to the place and time for, and expenses of, production of the deeds.*
2. *Production of—may be compelled by whom.*
3. *Non-production of—how far important.*
4. *Examination of—matters to be observed in.*

(1.) THE vendor may produce the deeds (*a*) for the purpose of verification, either at his own known residence (*b*), or upon or in the immediate vicinity of the estate (*c*), or in London (*d*); and the purchaser in such cases pays for the necessary journeys of his solicitor; if the deeds are in London, a country solicitor must employ a town agent to examine them, and cannot charge for a journey for that purpose; unless his client, (knowing the practice of the profession to be the other way,) requests him to undertake it (*e*): but a solicitor need not employ an agent in a country town to examine deeds, but may send a clerk (*f*).

Deeds
where to be
produced.

Expenses of
inspection.

And, where all the deeds cannot be produced at one of the usual places for production, the additional expenses of journeys thereby rendered necessary are borne by the vendor (*g*); where the conditions of sale reserve to the

Extra
expenses
consequent
on pro-
duction at
unusual
place.

(*a*) As to the right, as between the parties to a settlement, to the custody of the title deeds of the settled estate, see *Reece v. Trye*, 1 De G. & S. 273, n. (*a*).

K. 566; *Horlock v. Smith*, 2 Myl. & Cr. 523; *In re Tryon*, 7 Beav. 496.

(*f*) See *Hughes v. Wynne*, 8 Sim. 85.

(*g*) *S. C.*, Sug. 448: *quære*, whether the vendor can set off against the expenses of such journeys, the travelling expenses which the purchaser would have incurred had the

(*b*) Sug. 448.

(*c*) 1 Jarm. Conv. by S. 99.

(*d*) Sug. 448.

(*e*) *Alsop v. Lord Oxford*, 1 M. &

Chap. IX.	vendor the option of producing the deeds at any one of
Notice of place.	several specified places, he must give to the purchaser reasonable notice of the place selected for the purpose (<i>h</i>) ;
Deeds producible only under covenant for production.	if he have only a covenant for production, the purchaser may, it seems, require him to produce them, or at least to send his own professional adviser for the purpose of enforcing production ; as it might be refused to the purchaser's agent (<i>i</i>). In the case of a grant from the Crown, it is sufficient if the vendor's solicitor inform the purchaser where it may be seen (<i>k</i>) ; but the vendor must produce office copies or extracts of proved wills and records, and cannot require the purchaser to examine the originals at the public offices (<i>l</i>).
Grants from Crown.	
Instruments on record.	
Examination of deeds before perusal of title.	The purchaser may, as we have already shown, examine the deeds before laying the title before counsel ; and if the title prove bad, may recover the expenses from the vendor (<i>m</i>) ; but, in order to do this, he must prove the existence of a valid contract for sale (<i>n</i>).

(2.) *Production of deeds—may be compelled, by whom.*

As to who may compel production of deeds on sale. Owner of undivided share.

Where an estate is held in undivided shares, the owner of any share may, in Equity, compel the owner of any other share who holds the deeds to produce them for the satisfaction of a purchaser (*o*).

Of estate held under several titles created by single instrument.

So, where estates are held in severalty under separate titles created by a single instrument,—as in the case of a settlement, exchange, or partition (*p*),—the owner for the

deeds been produced upon the estate, or at the vendor's residence.

Bing. N. C. 499.

(*h*) *Rippingall v. Lloyd*, 2 Nev. & M. 410.

(*n*) *Gosbell v. Archer*, 4 Nev. & M. 485.

(*i*) *S. C.*, 419.

(*o*) See 2 Mer. 490 ; Sug. 468.

(*k*) Sug. 450.

(*p*) *Lord Banbury v. Briscoe*, 2 Ch. Ca. 42 ; Sug. 467 ; and see *Shore v. Collett*, G. Coop. 234 ; and *Att.-Gen. v. Lambe*, 3 Y. & C. 162 ; *S. C.* at the Rolls, 12 Jur. 386.

(*l*) Sug. 449 ; but as to furnishing copies on completion, *vide infra*, Ch. XIII.

(*m*) *Hodges v. Lord Litchfield*, 1

time being of any one such estate, or, it is conceived, of any part of it, may enforce production of such instrument. Chap. IX.

So, where a portion of an estate has been sold by the owner, who retains the deeds, the purchaser can, it appears, in Equity (*g*), enforce their production upon a resale (*r*); unless there was an understanding to the contrary; which would probably be implied from the circumstance of the title not being required upon the original sale. Purchaser of portion of estate.

Where an estate is in settlement, it appears that a contingent remainderman cannot enforce the production of the deeds for the purpose of effecting a sale or mortgage (*s*); nor, as a general rule, can a vested remainderman compel their production except under special circumstances; the more remote the remainder the stronger doubtless must be the case made for production; the existence of lineal relationship between the tenant in possession and the remainderman would increase the difficulty; for the circumstance of the transaction being disapproved of by the ancestor (especially if he were the settlor (*t*)) would go far to show its impropriety; and the Court would refuse to aid a party who was seeking to do himself an injury (*u*): even, however, as between father and son, the Court, it is conceived, might be so satisfied of the prudence and propriety of the particular arrangement as to depart from the general rule (*w*): the strongest case in favour of the general right to production would seem to be that of a remainder in fee immediately expectant on an estate for life, with no relationship existing between the parties; where, it may be conjectured, the remainder- Contingent remainderman cannot
Whether vested remainderman can do so.

(*g*) But not at Law; Sug. 472.

(*u*) See *Shaw v. Shaw*, 12 Pri.

(*r*) *Fain v. Ayers*, 2 Sim. & St. 167.
533.

(*w*) See *Lord Lempter v. Lord Pomfret*, 1 Dick. 238.

(*s*) *Noel v. Ward*, 1 Mad. 322.

(*t*) See Sug. 470.

Chap. IX.

man could enforce production for the purpose of a sale or mortgage, unless, from his youth or other special circumstances, the Court were satisfied it would best serve his interests by rejecting the application.

Remainder-
man under
a purchase-
deed.

And, it is conceived, that where, as sometimes happens, A. and B. jointly purchase property, taking the conveyance so as to give to B. merely an estate in remainder, B. has a general right to the production of the muniments of title.

Mortgagee
need not
produce
deeds until
paid off;

unless he
claim under
party who
himself is
liable to
produce
them.

A mortgagee is not, in general, bound to produce the deeds until he is paid off (*x*), even although the devisee of the mortgaged estate may be ignorant of all particulars relating to the security (*y*); since, however, a person can give no right which he does not himself possess, the mortgagee of a person who would be liable to produce the deeds must himself produce them at the suit of those persons who could compel their production as against the mortgagor (*z*); but he would not be justified in so producing them except with the consent of the latter, or under an order of the Court (*a*). So, the solicitor of a mortgagee has no lien upon the deeds, as against the mortgagor, to an amount exceeding what is due on the security (*b*). If the solicitor of the mortgagor induce the solicitor of the mortgagee to part with the deeds, by a

Solicitor's
lien.

(*x*) See *Sparke v. Montrion*, 1 Y. & C. 103; *Addison v. Walker*, 4 Y. & C. 447; *Greenwood v. Rothwell*, 7 Beav. 291; *Damer v. Lord Portarlington*, 15 Sim. 380. Lord Kenyon is said to have advised a mortgagee to put his deeds into a box, and sit upon it, until the money was put into his hands; see 1 Y. & C. 107.

(*y*) *Browne v. Lockhart*, 10 Sim. 421; see *Crisp v. Platel*, 8 Beav. 62.

(*z*) *Balls v. Margrave*, 4 Beav. 119;

and see *Hercy v. Ferrers*, *ib.* 97; see also a singular case of *Muston v. Bradshaw*, 10 Jur. 402; 15 Sim. 192; where it was held that a purchaser could not make the vendor's wife a defendant to a suit for specific performance, on the ground of her having possessed herself of the deeds.

(*a*) *Lambert v. Rogers*, 2 Mer. 490.

(*b*) *Hollis v. Claridge*, 4 Taunt. 807; see *Wakefield v. Newbon*, 6 Q. B. 276; and *Rider v. Jones*, 2 Y. & C. C. C. 329.

verbal undertaking to pay a sum claimed to be due for costs, such undertaking will be enforced summarily upon motion (*c*).

A mortgagee who consents to a sale by the Court, must bring the deeds into the Master's office in the usual way (*d*), and it is conceived, that, in an ordinary case, a mortgagee who has countenanced a mortgagor in selling under the expectation of his concurrence, would not be allowed to stop the sale by refusing to produce the deeds before actual payment.

Mortgagee consenting to sale by Court must produce deeds.

Case of mortgagee countenancing sale by mortgagor.

A mortgagee who has, even although insane, destroyed (*e*), or has negligently lost (*f*) the muniments of title, will, it seems, be compelled to replace such as can be replaced; and as respects originals which cannot be replaced, will be required either to give an indemnity or to make compensation for the damage thereby done to the estate; but a mortgagee taking the same care of the deeds forming his security as he took of his own, ought not, it would seem, to be severely dealt with if they are accidentally lost (*g*).

Liability of mortgagee for loss or destruction of deeds.

(3.) *Non-production of deeds—how far important.*

The non-production of the deeds is material, not only as it deprives the purchaser of the usual means of verifying the title deduced upon the abstract, but as inducing a suspicion that they may have been deposited by way of equitable mortgage; it has even been held, on a sale of a public-house in London, that their non-production amounted to notice to a mortgagee of such a deposit

Importance of non-production of deeds.

May affect purchaser with notice of their deposit.

(*c*) *In re Gee*, 2 Dowl. & L. 997.

(*f*) *Lord Middleton v. Eliot*, 15 Sim.

(*d*) *Livesey v. Harding*, 1 Beav.

531.

343.

(*g*) *Woodman v. Higgins*, 14 Jur.

(*e*) *Hornby v. Matcham*, 16 Sim.

846, V. C. K. B.

325.

Chap. IX.

with the brewers who supplied the house (*h*) ; this decision has been disapproved of (*i*) ; and has been thought to depend upon the presumed notoriety of the practice of London publicans so to deposit their deeds, and upon the fact of the mortgagee having been aware that the publican was indebted to the brewers : in fact the Court thought that there was wilful blindness, the security having been taken for the re-payment, not of a cotemporaneous advance, but of a sum already due (*j*) : however, in a very recent case, it was held by Sir *L. Shadwell*, V. C., that the omission to ask for the deeds was sufficient to postpone a mortgagee who took a conveyance of the legal estate by way of security for a pre-existing debt, although it did not appear that he was aware of the mortgagor being indebted to the prior incumbrancer (*k*).

(4.) *Examination of deeds—matters to be observed in.*

Points to be attended to in comparing abstract with the deeds.

In the examination of the abstract with the documents, the most scrupulous care is requisite on the part of the solicitor ; the object of the examination is to ascertain, 1st, that what has been abstracted is correctly abstracted ; 2nd, that what is omitted is clearly immaterial ; 3rd, that the documents are perfect, as respects execution, attestation, indorsed receipts, registration, stamps, &c. ; and 4th, that there are no indorsed notices, nor any circumstances attending the mode of execution, attestation, &c., &c., calculated to excite suspicion (*l*) : anything out of the ordinary course—such as the unusual position of the

(*h*) *Whitbread v. Jordan*, 1 Y. & C. 303.

(*i*) See 4 Y. & C. 563 ; Sug. 1054.

(*j*) 1 Ph. 255.

(*k*) *Worthington v. Morgan*, 16

Sim. 547 ; 13 Jur. 316 ; where it appears that the security was for money previously due.

(*l*) See *Kennedy v. Green*, 3 Myl.

& K. 699.

indorsed receipt (*m*),—should be made the subject of Chap. IX. inquiry; every part of every document ought to be read through; notice of an incumbrance is equally notice whether contained in one or in another part of a deed (*n*): perhaps few of the most important duties of a solicitor are so frequently performed in a perfunctory manner.

(*m*) See *Kennedy v. Green*, 3 Myl. & K. 699.

(*n*) See *Smith v. Capron*, 7 Ha. 189.

AS TO MATTERS ARISING BETWEEN DELIVERY OF ABSTRACT
AND PREPARATION OF CONVEYANCE.

1. *Time when essential at Law and in Equity.*
2. *Objections to title—negotiations upon and waiver of—when possession taken amounts to waiver.*
3. *General rights and liabilities of purchaser in possession.*
4. *Vendor in possession—alteration of property by—may avoid contract.*
5. *As to entry and possession by Railway Companies before completion.*

Time essential at Law,

(1.) AT Law, the time fixed for completion is of the essence of the contract ; and the purchaser may recover his deposit unless the vendor can deduce and verify a marketable title and give a conveyance at the time agreed on (*a*) ; if no time be fixed, a reasonable time must be allowed (*b*) ; and it has been held that a condition that the purchase-money shall be paid on a certain day, does not amount to a stipulation that the title shall be made out on or before that day (*c*).

but not in Equity, unless by express agreement or under special circumstances.

In Equity, however, although unreasonable delay will of itself conclude either party, the mere fact of the time fixed for completion having expired is no defence to a suit for specific performance ; except where time has been made of the essence of the contract by express agreement ; or

(*a*) Sug. 284.

(*b*) *Sansom v. Rhodes*, 8 Sco. 544.

(*c*) *S. C.* ; *sed quare* ?

where, from the circumstances of the case, such must clearly have been the intention of the parties (*d*).

For instance, on an agreement, by a tenant at will of a public house, for the sale of the possession, trade, and goodwill, at a fixed sum, and of the stock and furniture at a valuation, possession to be taken and the money paid on a given day, the delay of a single day on the part of the purchaser in having the valuation completed, and in taking possession and paying the purchase-money was held to relieve the vendor from the contract; inasmuch as he incurred fresh liabilities by retaining the premises, and the stock in the mean time varied (*e*).

As where vendor incurs liability by keeping property;

So, the fluctuating value of the property may alone show that time was to be of the essence of the contract; as upon an agreement for the sale of foreign stock (*f*), or of a reversion, (which may become an estate in possession during the delay, and the sale of which generally evidences immediate want of money (*g*),) or of a life annuity, or life estate, which may determine by the death of the *cestui que vie* (*h*).

or property is of fluctuating value;

or of a determinable character;

So, where the purchaser evidently requires the property for some immediate purpose (*i*).

or is evidently required at once;

So, where the vendors, (although beneficially interested,) are a fluctuating body, (as in the case of a Dean and Chapter,) where delay may give the purchase-money to persons other than those who signed the contract (*j*).

or where the vendors are a fluctuating body.

And the tendency of modern decisions has been to hold persons concerned in contracts relating to land, bound, as

Modern decisions tend to render time material.

(*d*) See Sug. 305.

(*e*) *Costlake v. Till*, 1 Russ. 376.

(*f*) *Doloret v. Rothschild*, 1 Sim. & St. 590.

(*g*) See *Newman v. Rogers*, 4 Bro. C. C. 391.

(*h*) See *Withy v. Cottle*, Turn. & R. 78.

(*i*) *Wright v. Howard*, 1 Sim. & St. 190; *Parker v. Frith*, *ib.* 199.

(*j*) *Carter v. Dean of Ely*, 7 Sim. 211.

Chap. X. in other contracts, to regard time as material; and this principle has been applied with the greater strictness where the property was connected with trade (*k*).

Purchase-money being required to discharge incumbrances, a material fact.

So, the circumstance of the purchase-money being evidently required for payment of incumbrances, is material; especially if the rate of interest which they bear exceed that which the purchaser is to pay during delay (*l*).

But private unexpressed motives for purchase immaterial.

But the private motives which may have induced a party to enter into a contract, unless expressed in the agreement, or such as might be anticipated from the general apparent circumstances of the case, do not make time essential; *e. g.*, the unexpressed intention to reside immediately upon the estate (*m*); where, however, the motive is of material importance—as in the case of the intention to reside—although not disclosed in the contract, it would, it appears, be sufficient to bind the vendor to the time named in the contract, if communicated at or within a reasonable period after its execution (*n*).

Effect of, if subsequently communicated.

Undertaking to deliver possession, not binding in equity.

But wilful delay concludes in Equity,

Nor is a mere undertaking that possession shall be delivered on a certain day, of itself binding in Equity (*o*).

In all the above cases the delay may be supposed to have arisen from the state of the title, or otherwise without any wilful or gross neglect by the party in default: gross or wilful neglect, however, by either party, will, in any case, entitle the other party to avoid the contract in Equity; *e. g.*, where the vendor, although urged by the purchaser to make out his title, takes no steps to do so, the purchaser immediately upon the expira-

either vendor,

(*k*) *Per* Wigram, V. C., in *Walker v. Jeffreys*, 1 Ha. 348; and see *Seaton v. Mapp*, 2 Coll. 556.

(*l*) *Popham v. Eyre*, Loft, 786; Sug. 292.

(*m*) See *Boehm v. Wood*, 1 Jac. &

W. 422.

(*n*) See 7 Ves. 279; and *Nokes v. Lord Kilmory*, 1 De G. & S. 444.

(*o*) See *Boehm v. Wood*, 1 Jac. & W. 419.

tion of the time fixed for completion may rescind the agreement (p)• Chap. X.

So, a purchaser who takes no steps to enforce the contract within a reasonable time, will be left to his remedies at Law; and the tendency of modern decisions is to diminish the time allowed to either party for enforcing his rights under the contract (q). or purchaser.
Less time now allowed.

Where time is not of the essence of the contract, and the delay originates in the state of the title, it is sufficient, upon a bill for specific performance being filed by the vendor, if a good title be shown at the date of the decree (r). Title at hearing sufficient in equity, where time not essential.

And, at Law, where no time is fixed for completion and the purchaser does not require the title to be produced, and none is produced before an action has been commenced by the vendor, it is sufficient if the latter perfect his title at any time before the trial (s); but if a title be produced, and prove defective or be not properly verified, and *à fortiori*, if the vendor, on being required to produce a title, altogether neglect to do so, the production of a perfect title before trial is insufficient (t). As to the rule at law.

But although time may not originally have been of the essence of the contract, either party may, by proper notice, bind the other to complete within a reasonable specified period (u). Time not originally essential may be limited by notice,

The notice should, at least as a matter of precaution, be in writing, and should allow a reasonable time for completion; what time can be so considered, must greatly depend upon the circumstances of the particular case; three days' notice by a vendor would be too short (v); so, a which must allow a reasonable period.
What is a reasonable period.

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|---|--|
| <p>(p) <i>Lloyd v. Collett</i>, 4 Bro. C. C. 184.
469.
(q) <i>Vide infra</i>, Ch. XVIII.; 6 Ha.
213.
(r) <i>Ibid</i>.
(s) <i>Thomson v. Miles</i>, 1 Esp. Ca.</p> | <p>(t) <i>Vide infra</i>, Ch. XVII.
(u) <i>Stewart v. Smith</i>, 6 Ha. 223, n.
(v) Sug. 306; See <i>Reynolds v. Nelson</i>, 6 Mad. 18.</p> |
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Chap. X.

week's notice by a purchaser, within which time the vendor was required to prove a disputed legitimacy, was held too short (*w*); two months' notice by a purchaser, within which time the vendor was required to remove an objection to the title depending upon a defective execution of a power, appears to have been considered sufficient in a recent case; which was, however, decided upon another point (*x*): in another recent case, where a delay of two months had occurred in procuring the execution of the conveyance by certain parties, a ten days' notice by the purchaser was considered sufficient (*y*).

Vendor giving notice need not return deposit.

Purchaser giving notice need not sue for deposit.

But purchaser cannot determine contract without previous notice.

It is not, as a general rule, essential to the binding effect of a vendor's notice, that he should, at the expiration of it, return or tender the deposit (*z*); nor, on the other hand, where the purchaser's notice has expired, is he bound to bring an action for his deposit (*a*).

But a purchaser cannot determine the contract without due previous notice (*b*); although notice even of immediate determination would, it is conceived, be so far material as that it would more strongly impose upon the vendor the necessity of using expedition in proceeding to enforce the contract; and the same principles would, it is conceived, apply to notices by a vendor.

Time for performing contract held to remain at option of purchasers.

Where a Railway Company had power at any time within seven years to take land for the purposes of the undertaking, and agreed to purchase land and to pay interest upon the purchase-money from the day they should commence their works on the land until the purchase-money should be paid, it was held that the vendor could not enforce specific performance; the Company not

(*w*) *King v. Wilson*, 6 Beav. 124.

(*x*) *Southcomb v. Bishop of Exeter*,

11 Jur. 727; 6 Ha. 213.

(*y*) *Benson v. Lamb*, 9 Beav. 502.

(*z*) Sug. 306.

(*a*) *Southcomb v. Bishop of Exeter*,

11 Jur. 727; 6 Ha. 213.

(*b*) *Taylor v. Brown*, 2 Beav. 181;

Wood v. Machu, 5 Ha. 158.

having commenced their works, and the seven years limited by the Act remaining unexpired (*c*).

Time, although essential, may be enlarged or waived;

And time, although of the essence of the contract by original agreement, or made imperative in Equity by subsequent notice, may be enlarged or waived, by subsequent agreement, or the acts of the parties.

Thus, if a purchaser proceed in the purchase after the expiration of the time fixed by the contract (*d*), or limited by his notice, it amounts to waiver (*e*).

as by proceeding in purchase, after expiration of time;

So, where a purchaser made no demand of the possession of the purchased premises until a quarter before twelve at night on the day fixed for completion—part of the property consisting of cottages let to weekly tenants—this was held, at Law, to be a waiver of the condition as to time (*f*).

or by neglect to require possession until the last moment.

But at Law, time, if fixed by an instrument under seal, cannot be enlarged by an instrument not under seal (*g*); so, if fixed by a written agreement not under seal, it cannot be enlarged by word of mouth (*h*).

How not enlarged at Law.

A conditional written waiver by a purchaser of his previous notice of abandonment, will be construed strictly against the vendor (*i*).

Conditional waiver.

And where the conditions provide for delivery of the abstract at a certain time, the purchaser waives them in Equity by receiving the abstract after that time; or even, it would seem, by perusing it unnecessarily, or retaining it, if delivered under circumstances which prevent its immediate rejection (*j*).

Time for delivery of abstract waived in Equity by receiving it after time;

(*c*) *Bodington v. Great Western Railway Company*, 13 Jur. 144. 503.

(*d*) *Boyes v. Liddell*, 6 Jur. 725. M. 410.

(*e*) *King v. Wilson*, 6 Beav. 124; and see *Ex parte Gardner*, 4 Y. & C. 503. (*h*) *Stowell v. Robinson*, 3 Bing. N. C. 928.

(*f*) *Palmer v. Temple*, 1 Per. & Dav. 379; see p. 381; 9 Ad. & El. 222, n. (*i*) See *Stewart v. Smith*, 6 Ha. 222, n.

(*j*) See *Seton v. Slade*, 7 Ves. 278.

Chap. X.

or by not
asking for it.

Suggested
extension of
the rule.

Time waived
by not
objecting to
certain or
highly prob-
able delay
in comple-
tion.

Effect of
protest in
such cases
—suggested
mode of
proceeding.

And a condition for delivery of the abstract on a certain day, is waived in Equity by a purchaser who does not ask for it within a reasonable time before the day fixed for its delivery (*k*) ; the same rule would, no doubt, apply to the production of evidence, &c. ; and it is conceived that a waiver of time as respects matters, (such as the delivery of the abstract, &c.,) which *must* necessarily precede completion by a considerable period, would, in general, amount to a waiver of the time (if any) fixed for completion.

So, a stipulation that time shall be of the essence of the contract, is waived by a purchaser who receives, and retains without objection, an abstract upon the face of which it appears that a title cannot be made within the time fixed for completion (*l*) ; or who, without an objection on that specific ground, proceeds with the purchase under a knowledge that there is no reasonable probability of the title being perfected in time for completion ; as when it depends upon the result of a hostile chancery suit (*m*).

It seems doubtful whether a mere protest against the delay will save the benefit of the stipulation (*n*) ; it is conceived, that until the expiration of the time limited for completion, a purchaser may safely, and is indeed bound to, proceed in the matter so long as a reasonable possibility exists of the title being perfected in time ; taking care, nevertheless, to protest in writing against the delay, and to give notice of his intention to insist on his strict rights. So soon as the time has expired, or so soon as it previously becomes certain that the title cannot be perfected in time, he should take no further steps in the matter, but should in writing rescind the contract ; and then, if inclined to give the vendor the opportunity of

(*k*) *Jones v. Price*, 3 Anst. 924.

(*m*) *Pinke v. Curteis*, 4 Bro. C. C.

(*l*) See *Hipwell v. Knight*, 1 Y. & 332.

C. 401, 419.

(*n*) See Sug. 300.

completing within a reasonable period, all subsequent communications should be expressed to be without prejudice to the notice of rescinding, and should take the shape of mere negotiations for a fresh agreement.

It may be observed, that even in a contract for or connected with the sale of land, the term *month* means *primâ facie* a lunar month; although it may be construed a calendar month, if, from the context, or from the surrounding circumstances at the time of making the contract, such appears to have been the intention of the parties (*o*).

“Month” means *primâ facie* a lunar month.

(2.) *Objections to title ;—negotiations upon and waiver of ;—when possession taken amounts to waiver.*

We have already (*p*) adverted to the effect which negotiations upon the title may have upon the vendor’s rights under the ordinary conditions limiting a time for taking objections, and giving him the power to rescind the contract.

Effect of negotiations upon condition as to objections.

It may be observed, that a solicitor purchasing from his client, cannot insist upon any objections to the title which he—or his then partner in the case of a firm—considered unimportant when acting for the client upon his original purchase (*q*).

Solicitor purchasing cannot object to title which he accepted for his client.

Care should be taken not to make frivolous or unnecessary objections or requisitions; objections clearly frivolous, made and persisted in, would certainly indispose, even if they did not prevent (*r*), a Court of Equity from enforcing the contract at the suit of the purchaser: it perhaps seldom happens, upon the perusal of a long abstract, that

Danger of frivolous objections and requisitions,

(*o*) *Lang v. Gale*, 1 Mau. & S. 111; 1 Y. & C. Ex. 401.

Simpson v. Margitson, 11 Q. B. 23; (*p*) *Supra*, 72.

and see Sir E. Sugden’s remarks, V. (*q*) *Bevor v. Simpson*, Tambl. 69.

and P. 283, on *Hipwell v. Knight*, (*r*) Sug. 291.

Chap. X.

either solicitor or counsel confines his requisitions within the strict limits of his client's rights; but it is of importance that no untenable requisition should be persisted in; for instance, where a purchaser had required unnecessary evidence, and had in consequence been refused that to which he was really entitled, he was not allowed his costs, although he obtained a decree for specific performance (*s*): we may here refer to a modern case, where, when a purchaser from a mortgagee alleged that the latter was unable to deliver possession, and insisted on the concurrence of the mortgagor, although the mortgagee offered to deliver possession, it was held, in a suit for specific performance, that the mortgagee was entitled to a decree with costs if *then* able to deliver possession, and the Court refused to inquire whether, when his offer to deliver possession was not accepted, he was able to perform it (*t*).

or of withholding objections, &c., whether it amounts to waiver.

As to costs incurred by vendor before fatal objection.

And, on the other hand, a purchaser should be careful not to hold back important objections or requisitions; if he knowingly do so, the question may arise whether he has not impliedly waived them (*u*); and where a purchaser puts a vendor to expenses in complying with requisitions, &c., and then takes and insists on a fatal objection, which he originally had the means of discovering, it seems probable that if a bill were filed by the vendor for specific performance and dismissed, the Court would not dismiss it with costs, without allowing to the vendor, by way of set-off, the expenses so incurred by him (*v*); although it does not appear that he could otherwise recover them (*w*).

Purchaser's *primâ facie* right to a good title.

We have already considered (*x*) what expressions will negative the purchaser's *primâ facie* right to a marketable

(*s*) *Newall v. Smith*, 1 Jac. & W. 407.
263.

(*t*) *Allen v. Martin*, 5 Jur. 239, R.

(*u*) See Sir E. Sugden's remarks
on *Magennis v. Fallon*, V. and P.

(*v*) See and consider *Deverell v.*
Lord Bolton, 18 Ves. 505, 514, 515.

(*w*) See Sug. 428.

(*x*) *Supra*, p. 66 *et seq.*

title; he will, however, be bound, not only by express stipulation, but also by a clear notice of the state of the title, given to him before entering into the agreement (*y*).

May be waived.

But a purchaser may, after the contract, either expressly or impliedly, waive, either wholly or in part, his right (whether it be absolute or qualified) to a marketable title, or to the usual evidences thereof.

We have seen that a purchaser is not bound by his counsel's approval of the title (*z*); if, however, counsel waive a requisition or objection, and the purchaser adopt his opinion and deal with the vendor on that view, he cannot afterwards repudiate it (*a*). Where a purchaser, having taken several objections, expresses himself willing to accept the title upon a specified objection being removed, this waiver of the other objections is merely conditional upon the removal of the specified objection; so that, if such objection be not removed and a bill be filed against him for specific performance, he is entitled to a general reference as to title (*b*). Acceptance of the title, as abstracted, is not a waiver of the purchaser's right to have the abstract verified (*c*): nor will the Court imply a waiver of any objection which is not clearly raised by the contents of the abstract (*d*); nor does a purchaser, by waiving his right to an abstract, necessarily waive objections to the title which are otherwise known to him (*e*).

Purchaser not bound by his counsel's opinion, unless he adopts it.

Effect of acceptance of title subject to specified requisition.

And waiver need not be express; it may be implied, either from letters or mere acts of the party.

Waiver may be implied

For instance, where a purchaser who had been let into possession—but which, as it was according to the contract,

from apologies in letter for non-payment of

(*y*) *Ogilvie v. Foljambe*, 3 Mer. & K. 255.
64.

(*z*) *Deverell v. Lord Bolton*, 18 Ves. 505. 217.

(*a*) *Alexander v. Crosby*, 1 Jones & Lat. 666. (*d*) *Blacklow v. Laws*, 2 Ha. 47.

(*b*) *Lesturgeon v. Martin*, 3 Myl. & Cr. 217. (*e*) *Sidebotham v. Barrington*, 3 Jur. 947.

Chap. X.

purchase-money.

From payment for, and dealing with, property.

Preparation or approval of conveyance, when a waiver.

Attempt to resell, no waiver:—to resell part, effect of.

does not appear to be very material—and who had retained the abstract for a considerable period without objection, and had altered and let the premises, wrote a letter to his solicitor for the purpose of its being communicated to the vendor, and therein expressed his “vexation at the delay which had happened about payment,” and his gratification “at the liberality and patience shown” to him, this was held to amount to an admission that the title was approved (*f*): and the same decision was come to in a later case, where a purchaser took possession under the contract, paid part and gave security for the residue of the purchase-money, and mortgaged her interest under the contract (*g*).

The preparation of the conveyance, cannot, in general, be much relied on as evidence of waiver (*h*); where, however, in the case of a lease, the lessee, without previously requiring a title to be shown, approved of a draft lease furnished by the lessor, and took possession under the contract, he was held to have waived all objections to the title (*i*): so, where a purchaser of a leasehold house, after transmission to him of the original lease, prepared a draft assignment, and made various objections as to repairs and other matters, but did not require the production of the lessor’s title, the Court seems to have considered that he had waived its production (*j*).

An attempted resale of the property, is, in general, immaterial; except that the actual or attempted resale of merely a *portion* of the estate, may, as between the original vendor and purchaser, show that the latter did not consider such portion material to the enjoyment of the residue (*k*).

(*f*) *Margravine of Anspach v. Noel*, 1 Madd. 310.

(*g*) *Haydon v. Bell*, 1 Beav. 337.

(*h*) See Sug. 402.

(*i*) *Warren v. Richardson*, You. 1.

(*j*) *Clive v. Beaumont*, 1 De G. &

S. 397; *Smith v. Capron*, 7 Ha. 191.

(*k*) See 1 Madd. 170.

Possession of the property by the purchaser is the fact most frequently relied on as furnishing evidence of waiver of objections to the title; its importance, however, depends upon the circumstances attending its acquisition and retention.

Chap. X.

Possession, how far to be relied on as evidence of waiver.

The strongest case against the purchaser, is, where he forcibly, or without the consent of the vendor, takes possession: forcibly taking possession, was held in an early case to amount to a waiver of an objection for want of title to an important part of the estate (*l*).

Forcible possession a waiver.

Possession, however, if taken in accordance with the clear intention of the parties as evidenced by the terms and subject-matter of the contract (*m*), or with the consent of the vendor (*n*), is not in itself, as a general rule, any waiver of the purchaser's right to a good title, or of any pending negotiations upon the title: where, however, the purchaser was, upon his own application, let into possession, this was held to be a waiver of an objection (*viz.*, a right of sporting over the property) which appeared upon the face of the abstract delivered three months previously, but had not been made the subject of remark by the purchaser or his solicitor (*o*): it is material here to observe, first, that the purchaser's general requisitions upon the title appear (*p*) to have been made prior to the application for possession; and secondly, that the objection was of a permanent character, and not probably capable of removal; the case may, perhaps, be held to show, that the acceptance of possession amounts to an implied waiver of any known objection, which the purchaser knows, or may reasonably believe, cannot be removed; or has not formed

Possession taken under contract, or with vendor's leave, no waiver;

except under special circumstances.

but may amount to waiver of objections, which are irremovable, or have not been in-

(*l*) *Calcraft v. Roebuck*, 1 Ves. jun.

59.

221.

(*o*) *Burnell v. Brown*, 1 Jac. & W.

(*m*) *Stevens v. Guppy*, 3 Russ.

168.

171.

(*p*) See 1 Jac. & W. 171.

(*n*) *Burroughs v. Oakley*, 3 Sw.

Chap. X.
cluded in
previous
requisitions.
Granting
lease equi-
valent to
possession.

part of his previous requisitions upon the title, (supposing any requisitions to have been already made).

The grant of a lease by the purchaser to a tenant in possession is equivalent to taking possession (*q*).

(3.) *As to the general rights and liabilities of a purchaser in possession.*

Purchaser
in possession
may gene-
rally act as
owner,
without
thereby
waiving
title.

It appears to be clear that a purchaser, when in the authorized possession of the estate, may, to a certain extent, act as owner without thereby accepting the title; he may take a fall of underwood in due course (*r*); so, in the case of a timber estate, a fall of timber would, it is conceived, be no necessary acceptance of the title, although it might be restrained at the suit of the vendor upon the ground of its diminishing his security for the purchase-money (*s*); nor does it appear that any act of management of the estate in a due course of husbandry, or in a fair exercise of the supposed right of ownership (*t*), would be of importance; thus it has been held by *V. C. K. Bruce* that, upon a purchase of four acres of land, stubbing up an osier bed of nine perches, levelling the land, and filling up a pond, did not amount to a waiver of title (*u*).

As by
altering
property.

Whether
universally
so.

In fact, Sir *E. Sugden* states without qualification (*v*), that "acts of ownership after an authorized possession are of no importance;" the reported cases, however, scarcely seem to support so wide a proposition; and it is, perhaps, hardly maintainable upon principle (*w*): if the purchaser of a house and pleasure-ground, let into possession pending the investigation of the title, were to fell all the orna-

(*q*) *Ex parte Sidebotham*, 1 Mont. & Ayr. 655.

(*r*) 3 Sw. 170.

(*s*) *Supra*, p. 118.

(*t*) 1 You. 506.

(*u*) *Osborne v. Harvey*, 1 Y. & C. C. C. 116.

(*v*) V. and P. 401.

(*w*) See *Donovan v. Fricker*, Jac. 165; *infra*, p. 223.

mental timber, he might, it is conjectured, find a difficulty in getting rid of his bargain upon the ground of the title being not strictly marketable.

At any rate, it appears that a distinction must be made between important acts of ownership committed previously to, and those committed after, the discovery of a serious objection to the title (*x*) ; for acts which materially affect the property are justifiable only under the purchaser's belief that he is in fact the owner.

Whether so after discovery of defect in title.

And where a purchaser, who had been long in possession of the property, and had taken frivolous objections to the title, refused to receive any further explanations, and yet retained possession, he was held to have accepted the title (*y*).

Retention of possession and refusal to discuss the title, held an acceptance.

And an act which amounts to a waiver of the purchaser's right to reject a defective title, is not necessarily a waiver of his right to compensation for the defect (*z*).

Waiver of title not always waiver of compensation.

So, acts by a purchaser in possession, which might otherwise have been considered as a waiver of objections to the title to a portion of the estate, were held to be modified by his continuing to ask for the title (*a*).

Modification of waiver by constant demand of title.

A purchaser may (*b*), and as a matter of prudence should, decline to take possession while the title is in dispute, except under a special agreement ; for, if he take possession and then reject the title, he may be ejected by the vendor, and cannot at Law claim any allowance for improvements or repairs ; nor will Equity afford him any relief unless there has been fraud on the part of the vendor (*c*) : upon taking possession, he becomes, in the

Purchaser rejecting title may be ejected without compensation for moneys expended.

(*x*) *Dixon v. Astley*, 1 Mer. 135 ;
See 1 You. 507.

(*a*) See 1 Madd. 170.

(*y*) See *Hall v. Laver*, 3 Y. & C. 196.

(*b*) *Forteblow v. Shirley*, 2 Sw. 223.

(*z*) See *Calcraft v. Roebuck*, 1 Ves. jun. 221.

(*c*) Sug. 1029 ; *Nicloson v. Wordsworth*, 2 Sw. 365.

Chap. X.

absence of any special agreement (*d*), tenant at will to the vendor (*e*); whose right to recover possession by ejectment will be subject to the 7th section of the 3 & 4 Will. IV. c. 2 (*f*). When a purchaser in possession under the contract is advised to rescind the contract, and assert a paramount title to the property, he is not bound to give up possession before asserting such paramount title by making a formal entry (*g*).

What allowances made when vendor has to sue in Equity

If the contract be rescinded in Equity, even on the ground of fraud in the purchaser (*h*), the Court will, in general, direct an allowance to be made to the purchaser for substantial improvements and repairs (*i*); this allowance however, when the sale is set aside at the suit of the purchaser, will not extend to improvements, or even repairs—except such as are essential to the preservation of the property (*j*)—made subsequently to the discovery of the matter on which he grounds his right to relief, nor to a greater extent than is specifically prayed by the bill (*k*).

for repairs, improvements, &c.;

but purchaser not liable for use and occupation, if title bad,

until it is rejected.

On the other hand, it has been recently decided, that, where the title proves defective, an action for use and occupation will not lie against the purchaser for the time during which he has been in possession under the contract (*l*): but if, after the contract is clearly abandoned, he retain possession, he will be liable in respect of such subsequent occupation (*m*): where a purchaser retained possession for eight years, without payment, and refused

(*d*) *Saunders v. Musgrave*, 6 B. & C. 524.

(*e*) *Doe v. Caperton*, 9 Car. & P. 112; *Doe v. Chamberlaine*, 5 Mee. & W. 14.

(*f*) *Doe v. Rock*, 4 Man. & Gr. 30.

(*g*) *Southcomb v. Bishop of Exeter*, 6 Ha. 213.

(*h*) See *Donovan v. Fricker*, Jac. 165.

(*i*) Sug. 1028.

(*j*) Sug. 279.

(*k*) See *Edwards v. M^rLeay*, 2 Sw. 282.

(*l*) *Winterbottom v. Ingham*, 7 Q. B. 611; and see *Hearne v. Tomlin*, 1 Pea. N. P. C. 253; *Kirtland v. Pounsett*, 2 Taunt. 145.

(*m*) *Howard v. Shaw*, 8 Mee. & W. 118.

either to accept the vendor's defective title or to abandon the agreement, and upon a bill being filed by the vendor and the Master reporting against the title, still refused to accept it, he was ordered to account for the rents and profits and to pay the costs of the suit (*n*).

Where C., a sub-purchaser from B., entered into possession, and then, pending a suit for specific performance by B. against A. (the original vendor), was induced by A. to give up possession under a mistake of facts, it was held that, upon a decree being made for specific performance of the contract between A. and B., and a conveyance being executed by A., C. could maintain use and occupation against him, for the time during which he had resumed possession (*o*).

Purchaser wrongfully induced to give up possession, may maintain use and occupation when contract is completed.

Where a contract was rescinded upon the ground of fraud in the purchaser, the latter was compelled to reinstate a private house which he had converted into a shop (*p*): the *fraud* is not noticed by Sir *E. Sugden* in stating the case (*q*); and if, as may therefore be supposed to be his opinion, this was not the ground of the decision, the decision seems to be an authority for this very reasonable proposition, viz.: that alterations by the purchaser, although not in themselves a waiver of title, will yet deprive him of the aid of a Court of Equity in rescinding the contract, if they are such as change the nature or character of the property, and do not admit of reinstatement.

Purchaser compelled to reinstate premises which he had altered.

Whether, if reinstatement impossible, purchaser may not be compelled to keep the property.

(4.) *Vendor in possession, by altering property avoids the contract.*

And, on the other hand, any alteration of the subject-matter of the contract by the vendor, in any particular

Material alteration of property

(*n*) *King v. King*, 1 Myl. & K. 442.

(*p*) *Donovan v. Fricker*, Jac. 165.

(*o*) *Hull v. Vaughan*, 6 Pri. 157;

(*q*) *Sug.* 279.

and see 7 Q. B. 617.

Chap. X.

by vendor
may avoid
contract;
e.g. fall of
ornamental
timber.

which does not admit of compensation or reinstatement, as the fall of ornamental timber (*r*), will entitle the purchaser to abandon the contract.

And in a case between vendor and purchaser, the Court, it is conceived, would consider whether the timber destroyed were in fact, or might reasonably be considered, ornamental; and would not—as in cases between tenant for life and remainderman—only regard as ornamental, timber which was planted or left for ornament (*s*).

Alterations
in value of
estate, or
failure of
considera-
tion.

We (*t*) have already considered the relative rights of the vendor and purchaser in the several events of the estate increasing or diminishing in value, or of the failure of the consideration for, or subject-matter of, the contract, before conveyance.

(5.) *As to entry and possession by Railway Companies before completion.*

As to entry
upon, and
taking pos-
session of,
lands by
Railway
Companies,
&c. before
completion
of purchase.

By the clauses of the Lands Clauses Consolidation Act, 1845, which relate to the entry upon lands by the promoters of the undertaking (*u*), it is, in effect, provided, that the promoters shall not, without the consent of the owners and occupiers, enter (*v*) upon any land, (except for the purpose of making surveys and other similar purposes specified in the act,) until they have paid or deposited the purchase-money or compensation for the same: if, however, before the amount of purchase-money or compensation has been determined by agreement, award,

(*r*) *Maggennis v. Fallon*, 2 Moll. 588.

(*s*) See 2 Moll. 588.

(*t*) *Supra*, p. 116 *et seq.*

(*u*) Sect. 84 to 92.

(*v*) This extends to a subterraneous entry; see *Ramsden v. Manchester Railway Company*, 5 Rail. Ca. 552;

in a late case the Court refused an injunction, when the entry had been merely for surveying and setting out the line, and the company were no longer in possession: *Fooks v. Wills, Somerset, and Weymouth Railway Company*, 5 Ha. 199.

or a verdict, they are desirous of entering, they are enabled to do so, upon making such deposit and giving such bond by way of security as are specified in the 85th section of the act: this security must be for the value of *all* the land comprised in the notice of purchase given by the promoters under the 18th section, although the proposed entry be upon only a part of such land (*w*) ; no prior notice to the landowner of the intention of the promoters appears to be necessary (*x*) : the deposit is to remain as a security for the performance of the bond, and is to be applied under the direction of the Court of Chancery (*y*) ; and it will not be paid to the company without notice to the landowner, although the purchase may have been completed by agreement, and the purchase-money paid (*z*) ; he does not, however, seem to have any lien upon it for his costs payable by the promoters (*a*). Any wilful entry by the promoters, without consent and before payment or deposit, is made the subject of a 10*l.* penalty : and the retention of possession after conviction in such penalty renders them liable to a penalty of 25*l. per diem* (*b*) : but the penalties are not incurred by

(*w*) *Barker v. North Staffordshire Railway Company*, 2 De G. & S. 55 ; and as to the form of the bond, see *S.C.* and *Poynder v. Great Northern Railway Company*, 2 Ph. 330 ; *Langham v. same Company*, 1 De G. & S. 486 ; and *Hoskins v. Phillips*, 5 Rail. Ca. 560 ; 3 Exch. 169 ; and, generally on the construction of the 85th section, *Wiley v. South-Eastern Railway Company*, 6 Rail. Ca. 100. In *Ran-kin v. East and West India Docks Company*, 14 Jur. 7, Lord Langdale, upon the application of mortgagees, restrained the Company from prosecuting their works until they had paid or tendered to the mortgagees

the compensation required by the Act, (see s. 114) : but held that he had no jurisdiction to restrain the Company from keeping possession of the premises.

(*x*) *Bridges v. Wilts, Somerset, and Weymouth Railway Company*, 11 Jur. 315.

(*y*) Sect. 87.

(*z*) *Ex parte South Wales Railway Company*, 6 Rail. Ca. 151.

(*a*) *Ex parte Sterens*, 2 Ph. 772.

(*b*) Sect. 89 ; see *Hutchinson v. Manchester Railway Company*, 15 Mee. & W. 314 ; and *Hutchinson v. East Lancashire Railway Company*, 3 Rail. Ca. 748.

Chap. X.

an entry after payment or deposit made to or in favour of parties who were believed to be but were not actually entitled (c) : in case of an unlawful refusal by the landowners or occupiers to give up possession or permit an entry, the promoters of the undertaking can claim the assistance of the sheriff (d) : and a landowner who has by his silence and conduct encouraged a company to carry on their works, upon the supposition that they were entitled to enter and take the land in question, and who subsequently disputes the terms of the contract, is not entitled to an interlocutory injunction to restrain them from so entering (e).

(c) See last note.

(d) Sect. 91.

(e) *Greenhalgh v. Manchester and*

Birmingham Railway Company, 3 Myl.
& Cr. 784.

CHAPTER XI.

AS TO SEARCHES FOR AND INQUIRIES RESPECTING INCUMBRANCES.

1. *What inquiries should be made of vendor's solicitors; and of supposed incumbrancers, trustees, and tenants.*
2. *What searches should be made for incumbrances,—law respecting judgments, &c.*
3. *Time for making searches and inquiries.*

(1.) It appears to be a desirable, although it is not, perhaps, a very usual course, to inquire of the vendor's solicitors, (as part of the general requisitions on the title,) whether they are aware of any judgment or other incumbrance affecting the property, or other matter not noticed in the abstract and affecting the vendor's ability to make a marketable title (*a*): such an inquiry may often save much useless expense, and a favourable reply not only adds to the security which the purchaser will derive from the searches of his own professional advisers, but will also remove any doubt as to his right to be paid for the preparation of the conveyance, if such searches disclose incumbrances which cannot be got in: the inquiry should specify any matter the existence of which is specially apprehended; and when there is reason to suspect the existence of any particular incumbrances, an application should be made to the supposed incumbrancers; the motive

Inquiry as to incumbrances, should be made of vendor's solicitors;

and of supposed incumbrancers.

(*a*) It may also be expedient to inquire whether the property is held under the title abstracted, and under no other title: see Mr. Christie's evidence before the Registration Commissioners; 1st Report.

Chap. XI.

for the application should, of course, be stated, and the parties applied to will be bound by their replies (*b*) ; it does not, however, appear that an incumbrancer need answer any inquiry respecting the particulars of his security, unless the applicant is entitled and offers to redeem him (*c*).

Whether incumbrancer need communicate his claim to intended purchaser.

And an incumbrancer, it is said, need not voluntarily communicate the existence of his claim to a person whom he knows to be about purchasing the estate (*d*) ; this, however, it is conceived, only holds good in cases where there is no reason to suppose that the vendor is about to commit the fraud of selling the estate as unincumbered ; if, with knowledge of such a fraud being in progress, the incumbrancer were to conceal his claim, Equity, it appears, would interfere to prevent his setting up his right against the purchaser ; and infancy, or coverture, would be no excuse (*e*) : *à fortiori*, would he be postponed in Equity, if a party to the fraud, or facilitating or encouraging its commission (*f*) : and, inasmuch as no prudent person buys an equity of redemption without communicating with a known incumbrancer, it may be conjectured, that if a mortgagee, being aware that the purchase was about to be concluded on a certain day, and having received no inquiry from the purchaser on the subject of the charge, were to allow him to complete in ignorance of its existence, the Courts would be disposed, on slight additional grounds, to treat such an incumbrancer as an accomplice of the vendor.

Inquiry should be made of trustees ;

If the interest about to be purchased be merely equitable, inquiry as to incumbrances should, (as a matter of prudence,) be made of the trustees or other parties in whom the legal estate is vested, and notice given to them

(*b*) *Ibbottson v. Rhodes*, 2 Vern. 554 ; *vide supra*, p. 42.

(*c*) See *Buyden v. Bignold*, 2 Y. & C. C. 390.

(*d*) *Osborn v. Lea*, 9 Mod. 96 ; see p. 97.

(*e*) *Savage v. Foster*, 9 Mod. 36 ; *Clare v. Earl of Bedford*, 13 Vin.

Abr. 536.

(*f*) *Berrisford v. Milward*, 2 Atk.

49.

of completion: it does not, however, appear that a purchaser's rights, (in the case of equitable estates in land,) are affected by his omitting to make such inquiry, or give such notice (*g*); and the inquiry, if unnecessary, need not, it is conceived, be answered; trustees are often unwilling to answer such questions, on account of a case (*h*) where a trustee, who (through forgetfulness as he subsequently alleged) denied the existence of a charge of which he had notice, was held liable to the purchaser; it appears, however, that he told the purchaser "positively and distinctly" (*i*) that the vendor was absolutely entitled, that he had "an undoubted right" to assign the property (*k*); and, probably a less positive reply, one, for instance, merely denying the present recollection of any notice, would not involve a trustee in similar liability.

Chap. XI.
but does not
give priority
in case
of real
estate.

Liability of
trustee
giving
wrong in-
formation.

And as notice of a tenancy is notice of the tenant's equities (*l*) it is a proper precaution, where the property is not in hand, to inquire of the occupying tenants as to the extent and nature of their interests (*m*); it appears, however, that notice of a tenancy is not necessarily notice of the tenant's equities as between vendor and purchaser (*n*); nor is the doctrine above referred to likely to be extended (*o*); nor need inquiries be made of a person who has recently held but has relinquished possession (*p*).

Inquiry of
tenants.

(2.) *What searches should be made for incumbrances;—*
Law respecting judgments, &c.

A solicitor is said to be liable to his client for any loss which may be occasioned by his omission to make any one

Liability of
solicitor
omitting to

- | | |
|---|--|
| (<i>g</i>) <i>Jones v. Jones</i> , 8 Sim. 633; | 249. |
| <i>Wiltshire v. Rabbits</i> , 14 Sim. 76; | (<i>n</i>) 1 Jarm. Conv. by S. 119. |
| <i>Wilmot v. Pike</i> , 5 Ha. 14. | (<i>n</i>) <i>Nelthorpe v. Holgate</i> , 1 Coll. |
| (<i>h</i>) <i>Burrowes v. Lock</i> , 10 Ves. | 203. |
| 470. | (<i>o</i>) 1 Ha. 62; but see <i>Penny v.</i> |
| (<i>i</i>) <i>Ibid.</i> p. 476. | <i>Watts</i> , 1 Mac. & G. 150. |
| (<i>k</i>) <i>Ibid.</i> p. 475. | (<i>p</i>) <i>Miles v. Langley</i> , 1 Russ. & |
| (<i>l</i>) <i>Daniels v. Davidson</i> , 16 Ves. | M. 39. |

Chap. XI.
search for
incum-
brances, &c.

of the numerous searches which may by possibility disclose matter affecting the title (*q*) ; unless, however, special circumstances render such a course expedient, it is not usual for conveyancing counsel to direct a search for more than judgments, crown debts and accountants' ships, and *lis pendens*, and also a general search in the County Register (if any), and in the Manorial Court Rolls, (if the property is copyhold ;) and it may be doubted whether a solicitor would be liable for an omission which is sanctioned by general practice : at any rate, it is conceived, that where the title is laid before counsel, who advises a search for certain specified incumbrances, the solicitor need not make a more extensive search unless aware of some particular reason for so doing.

As to
searching
for judg-
ments—
general law
respecting.

Of these searches, the most generally important is that for judgments ; to understand the necessity for which, it will be necessary to consider briefly the old law, as it existed prior to the 1 & 2 Vict. c. 110, and the alterations which have been introduced by that statute.

As respects
purchasers,
&c., with-
out notice,
law remains
as before
1 & 2 Vict.
c. 110.

And here it may be proper to observe, that as against purchasers or mortgagees who advance their money without notice of subsisting judgments, the 1 & 2 Vict. c. 110, is rendered a dead letter by the subsequent Act of 2 & 3 Vict. c. 11, (except, perhaps, as respects judgments in the Palatinate Courts :) so that, as respects such purchasers and mortgagees, the Law as it existed before the passing of the former Act, is, with the above exception, alone important ; nor does registration under that Act amount to notice (*r*) : at the same time it is inexpedient to rely upon any presumed want of notice (*s*), (especially where the same solicitor acts for both parties ;) and the propriety of a search by an intended purchaser or mort-

But want of
notice
cannot be
relied on
in practice.

(*q*) 1 Jarm. Conv. 104.

(*r*) See and consider 2 & 3 Vict.
c. 11, s. 5.

(*s*) For this, among other reasons,

viz. : that if judgments exist, and are discovered by a sub-purchaser upon a re-sale, it may be impossible to satisfy him of the original want of notice.

gagee, may, practically, be considered chiefly with reference to the extended effect of judgments under the new law.

Upon an *elegit*, under the old law, the judgment creditor might take in execution a moiety, (or under two judgments of the same term an entirety,) of the following property of his debtor (*t*); viz., freeholds, land held in ancient demesne, rent-charges, estates granted by the Crown for the maintenance of dignities, impropriate tithes, and terms of years, including, (probably,) leases of copyholds granted by license of the lord, or, (it is conceived,) under a special custom; and this, whether the same respectively were held in severalty, coparcenery, or in common.

Judgments under old law, what they affected.

The right affected reversions, estates held by a husband during coverture or by the curtesy, estates tail during the life of tenant in tail, and estates held in joint-tenancy during the life of the joint-tenant.

And, as to terms of years, either the moiety might be extended upon a single writ, or the entirety might be sold as part of the debtor's chattels.

And, under the Statute of Frauds, the legal rights of the creditor were extended to estates of which a trustee was *seised* simply in trust for the debtor at the time of execution sued (*u*); this provision, it will be observed, does not affect trusts of terms for years, nor has it been held to affect equities of redemption, or any equitable estate in which the debtor has not the sole beneficial interest (*v*).

But advowsons in gross, glebe, rents-seck, and copyholds (except as respects leases thereof) are not extendible under the old law; nor are the lands of a tenant in tail, or joint-tenant, so extendible, except for his life (*w*).

What they did not affect.

And it seems doubtful whether the exemption of copyholds extended to customary freeholds (*x*).

(*t*) Prid. on J. 7, 8, 9.

(*w*) *Ibid.* 8.

(*u*) *Ibid.* 15.

(*x*) See Scriv. on Copyholds, 570.

(*v*) *Ibid.* 18.

Chap. XI.

Nor, as against purchasers (*y*), was a term for years bound, until the writ was delivered to the sheriff (*z*).

Docketing was necessary as against purchasers.

And in order that a judgment might be binding as against purchasers or mortgagees, it had to be docketed under the Act of William and Mary; and, (if intended to affect land in a Register County,) entered in the local register (*a*).

But purchaser was bound in Equity by notice of undocketed judgment.

The omission to docket or register, was, however, immaterial in Equity, if a purchaser or mortgagee advanced his money with actual notice, (either to himself or his agent,) of the judgment (*b*).

Equity aided judgment creditor against equitable estates.

And Equity would assist a judgment creditor to the partial equitable interest of his debtor, in those cases in which he would have been entitled to execution under the Statute of Frauds in case the debtor had owned the entire beneficial interest (*c*); but he was obliged to sue out an *elegit* before filing his bill (*d*).

Judgment, how affected by bankruptcy.

But the judgment creditor acquired no preference in bankruptcy, unless execution had been sued before the issuing of the fiat or commission (*e*).

Purchaser without notice protected by legal estate.

It followed, from what has been above stated, that a purchaser who, before execution sued (*f*), got in an outstanding legal estate, (even a mere satisfied term,) or procured a declaration of trust in his favour by the trustee, or who, (as in the case of a mortgagee purchasing the equity of redemption,) was himself seised or possessed of the legal estate, was protected from judgments of which he had no notice (*g*) at the time of his purchase; but of course, where the outstanding estate was less than the fee

(*y*) *Sed aliter*, as against the debtor's personal representatives; *Ranken v. Harwood*, 5 Ha. 215.

(*z*) *Prid.* on J. 13.

(*a*) *Ibid.* 47, 49.

(*b*) *Ibid.* 51; *Sug.* 661.

(*c*) *Prid.* on J. 25.

(*d*) *Neate v. Duke of Marlborough*,

3 Myl. & C. 407; *Smith v. Hurst*, 1 Coll. 705.

(*e*) 6 Geo. IV. c. 16, s. 108; see now 12 & 13 Vict. c. 106, s. 184; and see Coote on Mortgages, 3rd ed. 68.

(*f*) *Sug.* 659.

(*g*) *Tenstall v. Trappes*, 3 Sim.

286, 299.

simple, it was no protection against subsisting judgments of a date prior to its creation; and the want of notice was essential in Equity.

But the exercise of a power of appointment defeated a judgment entered up subsequently to the creation of the power, and notice in this case was immaterial (*h*), for the judgment only affected the estate limited until and in default of appointment.

A judgment entered up against the vendor, subsequently to the contract but before conveyance, was immaterial in Equity (*i*), except that it formed a lien upon such part (if any) of the purchase-money as remained unpaid (*k*): and an ejectment against a purchaser in possession, by a creditor who had sued out an *elegit* on such a judgment, would be restrained by injunction (*l*): so, also, a trust for sale, if well created, was not affected by subsequent judgments; nor, if the trustee had power to give receipts, were the judgment creditors necessary parties to the conveyance (*m*): nor was it material that the sale was not by the trustees, but by the Court (*n*); and the same, it is conceived, is the rule under the new law.

By the 11th section of the 1 & 2 Vict. c. 110, (as modified by the 2 & 3 Vict. c. 11, and 3 & 4 Vict. c. 82,) a judgment, duly registered, entitles the creditor to take in execution, except as against purchasers or mortgagees who became such before the 1st day of October, 1838, and also purchasers and mortgagees without notice (*o*), an entirety of "all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person

Purchaser under power of appointment, not affected by judgments, notwithstanding notice.

Effect of judgment after contract.

Extended legal remedies of creditor under new law.

(*h*) 3 Sim. 300; *Eaton v. Sanxter*,

N. S., Ch. 8.

6 Sim. 517; *Skeels v. Shearly*, 3 Myl. & C. 112.

(*m*) *Lodge v. Lyseley*, 4 Sim. 70.

(*n*) *Alexander v. Crosby*, 1 J. &

L. 672.

(*i*) Sug. 653.

(*o*) 2 & 3 Vict. c. 11, s. 5.

(*k*) Prid. on J. 21.

(*l*) *Brunton v. Neale*, 14 L. J.,

Chap. XI.

against whom execution is so sued, or any person in trust for him, shall have been seised, or possessed, at the time of entering up (*p*) the said judgment, or at any time afterwards; or over which such person shall, at the time of entering up such judgment or at any time afterwards, have any disposing power, which he might, without the assent of any other person, exercise for his own benefit."

Under these provisions, it will be observed that, under an *elegit*, the creditor can take the entirety (instead of a mere moiety) of the property; and this right extends to copyholds, estates subject to a general power of appointment, and, (probably,) terms for years and simple trusts thereof (*q*); and that, as respects legal terms for years (*r*) and equitable estates generally, the judgment is now binding from the time of its being entered up, instead of, as formerly, from the date of execution.

It is also observable, that the estate of a joint-tenant is extendible as against a surviving joint-tenant, and not, as formerly, merely for the life of the debtor.

It also seems probable, that the judgment creditor of a tenant in tail, (where there is a protector,) can take the land in execution as against the issue in tail; and that the judgment creditor of a tenant in tail, (where there is no protector,) can take the land in execution, not only as against the issue in tail, but also as against remaindermen.

It does not, however, appear, that the creditor acquires any remedy at Law against equitable estates, except in

(*p*) That is, the day on which judgment is originally signed in the Master's book, not the day on which the roll is carried in and the judgment is entered of record; and this, although the original entry in the Master's book be subsequently amended on a revision of the taxation of costs: *Fisher v. Dudding*, 3 Man. &

G. 238; *Newton v. Grand Junction Railway Company*, 16 Mee. & W. 142; but see *Peirce v. Derry*, 4 Q. B. 635.

(*q*) Prid. on J. 68; Sug. 667; see however Coote on Mortgages, 3rd ed. 44.

(*r*) Sug. 667.

cases of simple trusts in favour of the debtor; *e. g.*, it is conceived that an equity of redemption cannot be taken in execution (*s*), but that land held simply in trust for the debtor at the date of the judgment can be taken in execution, notwithstanding intermediate alienation, (unless to an alienee for valuable consideration and without notice).

And by the 13th section of the 1 & 2 Vict. c. 110, (as modified by the two later Acts,) a registered judgment is (except as against purchasers or mortgagees without notice, or who became such before 1st October, 1838,) made to “operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents, and hereditaments (including lands and hereditaments of copyhold or customary tenure) of or to which such person shall at the time of entering up such judgment, or at any time afterwards, be seised, possessed, or entitled for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which such person shall at the time of entering up such judgment or at any time afterwards, have any disposing power which he might without the assent of any other person exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against the issue of his body and all other persons whom he might without the assent of any other person cut off and debar from any remainder, reversion, or other interest in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents, and hereditaments; and that every judgment creditor shall have such and the same remedies in a Court of Equity against the hereditaments so charged by virtue of the Act, or any part thereof, as he would be entitled to in case the person against whom such

Extended
equitable
remedies of
creditor
under new
law.

Chap. XI. judgment shall have been so entered up had power to charge the same hereditaments and had by writing under his hand agreed to charge the same, with the amount of such judgment debt and interest thereon: Provided that no judgment creditor shall be entitled to proceed in Equity to obtain the benefit of such charge until after the expiration of one year from the time of entering up such judgment" (t).

These provisions leave no doubt as to the rights in Equity of a judgment creditor of a tenant in tail.

Judgment,
how now
affected by
bankruptcy.

So, in case of bankruptcy, the judgment creditor would seem, under the 13th sect. of the Act, to have all the rights of an equitable mortgagee, provided that the judgment was entered up twelve months before the issuing of the fiat (u): in the case of a judgment entered up under a warrant of attorney, and of the subsequent insolvency of the debtor, the judgment creditor's security is not affected by the 61st section of the Act (w).

The recent Bankruptcy Law Consolidation Act (x) avoids warrants of attorney to confess judgment in any personal action and being for or in respect of, wholly or in part, an antecedent debt or money demand and every *cognovit actionem* or consent to a judge's order for judgment in any action commenced by collusion with the bankrupt or not adversely, or purporting to be given in an action, but having been in fact given before the commencement of any action against him, in cases where the same respectively are given on or after the 11th October, 1849, and within two months before filing the petition in bankruptcy and the bankrupt at the time of giving the same is unable to meet his en-

(t) See *Smith v. Hurst*, 1 Coll. 705. As to the form of decree which may be obtained by a judgment creditor, see *Carlon v. Farlar*, 8 Beav. 525.

(u) Sect. 13 of Act; and see *Rol-*

leston v. Morton, 1 Dru. & W. 195, and 12 & 13 Vict. c. 106, s. 184.

(w) *Hotham v. Somerville*, 9 Beav. 63.

(x) Sect. 135; and see ss. 136, 137.

gagements; whether they be given in contemplation of bankruptcy or not. Chap. XI.

The recent important case of *Whitworth v. Gaugain* (y) seems to show that the statements in the text books that a judgment under the new law operates as a specific charge upon the debtor's lands, must be received with very serious qualification, if in fact the expression be any longer applicable: this case established the following principle: viz., that where a debtor has merely a modified or qualified interest in the lands, as where he holds them wholly or in part as a trustee or subject to any previous incumbrance whether legal or merely equitable, the judgment must be considered as the statutory equivalent to his written agreement to charge, not the lands themselves, but merely that which he may rightfully charge, viz., his beneficial interest (if any) in them; so that the judgment creditor, although he subsequently acquire the legal estate, is postponed to a *cestui que trust*, or a prior equitable incumbrancer who advanced his money upon the security of the specific property.

Judgment creditor postponed to *cestui que trust* or prior equitable incumbrancer.

In the recent case of *Harris v. Davison* (z), Sir L. Shadwell, V. C., with reference to the 13th section of the 1 & 2 Vict. c. 110, said, that he "could not conceive any set of words better adapted to describe every possible interest in lands of every possible description; they are as comprehensive as possible, and include lands of every tenure, except, perhaps, lands held in ancient demesne;" he then decided that a registered judgment operated as a charge upon the beneficial interest of the debtor (the grantee of a personal annuity) under a trust for sale of leaseholds for better securing the payment of the said annuity: this decision (which seems to involve the necessity of a search for

Harris v. Davison.

Judgment whether a charge on

(y) 1 Phil. 728; and see *Newlands v. Paynter*, 4 Myl. & Cr. 408; *Langton v. Horton*, 1 Ha. 549, 560.
(z) 15 Sim. 128.

Chap. XI.
mortgage
debt.

judgments against a mortgagee upon taking a transfer of or paying off the mortgage debt) has, it is understood, been to a considerable extent disregarded in practice by conveyancers (*a*).

Is a charge
on annuity
issuing out
of land.

But an annuity given by a will, and charged upon, or issuing out of land, is an interest in land within the Statute (*b*); so that a search for judgments against such an annuitant will be necessary, if his annuity is to be released or dealt with.

And prob-
ably on
legacy
charged on
land.

The same, it is conceived, must be the rule as to a legacy charged upon land.

So, on
unpaid pur-
chase-
money,

A judgment entered up against the vendor after a contract for sale, is, as formerly, an equitable charge upon the unpaid purchase-money; although execution cannot be levied upon it (*c*); and so, upon a sale by a mortgagee, the surplus proceeds of sale are charged by judgments entered up against the mortgagor subsequently to the mortgage (*d*).

and on sur-
plus pro-
ceeds of sale
by mort-
gagee.

Certain de-
crees and
orders have
the effect of
judgments.

By the 18th section of 1 & 2 Vict. c. 110, decrees and orders of Courts of Equity, and all rules of Courts of common law, and all orders of the Lord Chancellor, or of the Court of Review (while it existed) in matters of bankruptcy (*e*), and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, are to have the effect of judgments.

Remedies
under new

And by the 19th and 21st sections of the same Act, in

(*a*) See Mr. Christie's evidence before the Registration Commissioners, 1st Report; but see also *Clare v. Wood*, 4 Ha. 81; Coote on Mortgages, 3rd ed. 44: the general and safer practice appears to be to make the search.

De G. & S. 209.

(*c*) *Brown v. Perrott*, 4 Beav. 585.

(*d*) *Robinson v. Hedger*, 13 Jur. 846; 14 Jur. 784, V. C. E.

(*e*) And see now 12 & 13 Vict. c. 106, ss. 123, 248.

(*b*) *Youngehusband v. Gisborne*, 1

order that any judgment, decree, order, or rule, may become operative under the Act as against purchasers, mortgagees, or creditors, a memorandum thereof must be left for registration (*f*) with the Senior Master of the Common Pleas at Westminster; or, (in the case of a judgment obtained in the Courts of Lancaster or Durham,) with the prothonotary, or deputy prothonotary, or other appointed officer of such Courts respectively; and by the 2 & 3 Vict. c. 11, the old dockets were closed, and judgments then docketed were not to affect lands, &c., as against purchasers, mortgagees, or creditors, after the 1st August, 1841, until a memorandum thereof was left for registration at Westminster under the 1 & 2 Vict. c. 110; and as respects judgments registered at Westminster, a fresh memorandum was required to be left for registration every five years (*g*); so that in no case need a search at Westminster extend back for more than five years; but the search for the five years preceding the purchase should be made, not only as against the present vendor, but also against former owners, although more than five years may have elapsed since they parted with the property.

Chap. XI.
law depend
upon regis-
tration.

It may be here observed, that where a judgment is re-registered after the expiration of more than five years from the date of the last registration, there seems to be nothing in the Act to affect its validity, except as against purchasers or mortgagees claiming under an instrument executed between the expiration of such period of five years and the subsequent registration.

Neglect to
re-register
within five
years—
effect of.

No provision seems to be made for the fresh registration of judgments, &c., in the Palatinate Courts of Lancaster and Durham; the 4th section of the 2 & 3 Vict. c. 11, clearly

Fresh regis-
tration of
judgments
in Palati-
nate Courts,
whether ne-
cessary.

(*f*) Notwithstanding these are the words of the Act, it may be doubted whether the judgment would bind purchasers, &c., if the officer having

received the memorandum were to omit to register it.

(*g*) See ss. 1, 2, and 4, of 2 & 3 Vict. c. 11.

Chap. XI.

What searches should be made in purchasing estates in Counties Palatine.

(as it appears) referring merely to those judgments, &c., which must be originally registered with the senior Master of the Court of Common Pleas at Westminster: therefore, upon a purchase of lands in one of the Counties Palatine, the search in the local index should, it is conceived, be carried back as far as was usual under the old practice; viz., in ordinary cases, ten years from the date of the search, or ten years from the earliest registered judgment, if any were met with; and, since lands in a County Palatine may be extended on a judgment obtained in one of the superior Courts at Westminster, it will also be proper to search the Register at Westminster (*h*).

Judgments in Palatine Courts, whether binding on purchasers without notice.

And there seem to be grounds for contending that judgments registered in the Palatinate Courts have their full effect under the 1 & 2 Vict. c. 110, even as against purchasers and mortgagees without notice; inasmuch as the words "as aforesaid," in the 5th section of the 2 & 3 Vict. c. 11, seem to identify the judgments, decrees, &c., mentioned in that section, with those mentioned in the preceding section; and those, as before observed, appear to be such only as are required to be registered with the senior Master of the Common Pleas at Westminster: and a similar question seems to arise as to the applicability of the 2nd section of the 3 & 4 Vict. c. 82, to Palatinate Judgments.

Purchaser with notice of unregistered judgment, how far liable.

A purchaser with notice of an unregistered judgment is protected (*i*) from the additional remedies of the judgment creditor under the 1 & 2 Vict. c. 110; and, since the old dockets are closed, he is equally safe from any remedy which under the old law depended upon docketing; but it is conceived to be doubtful whether a purchaser with notice of an unregistered judgment is not still bound in Equity to the same extent as he would have been bound

(*h*) Prid. on J. 119.

(*i*) 3 & 4 Vict. c. 82; *quære*, as to Palatinate Judgments. *Vide supra*.

under the old law by notice of an undocketed judgment ; for instance, whether, if purchasing from an owner in fee simple, he would not be liable in Equity to have a moiety of the land subjected to the claim of a creditor of whose unregistered judgment he had notice at the time of advancing his money ; although if purchasing under a power of appointment, he might altogether disregard unregistered judgments against the vendor of a date subsequent to the creation of the power ; inasmuch as, under the old law, the exercise of the power defeated such judgments as well in Equity as at Law : it has even been made a question whether a purchaser may not at Law be bound by a judgment neither docketed nor registered in the same way as he would have been bound by it before the Act of William and Mary (*k*) : but the point does not seem to be one of real difficulty (*l*).

It appears however to be the opinion of Sir *E. Sugden* that where a judgment has been once docketed under the old Acts, but has not been registered under the 1 & 2 Vict. c. 110, or where a judgment having been registered under that Act has not been re-registered at the end of five years, under the 2 & 3 Vict. c. 11, a purchaser for value, although aware of its previous docketing or registration, may presume that it has been satisfied (*m*).

Judgment docketed but not registered, or registered but not re-registered presumed to be satisfied.

Except in the case of copyholds (*n*), search should be made at the Common Pleas for debts and accountantships to the Crown ; and the search must not be confined to the last five years, as fresh registration of these liabilities is not required ; and as the 8th section of 2 & 3 Vict. c. 11, is not retrospective (*o*), it will still, for some time to come,

Crown debts and accountantships.

See also

(*k*) Coote on Mortgages, 50.

& Wal. 542 ; *Hickson v. Collis*, 1 J. & L. 94.

(*l*) Sug. 667.

(*m*) *Beere v. Head*, 3 J. & L.

(*n*) *Aldrich v. Cooper*, 8 Ves. 394 ;

340 ; and see *Bedford v. Forbes*, 1

Scriv. on Cop. 88.

Car. & K. 33 (Cresswell) ; and upon

(*o*) Sug. 673.

the Irish Acts, *Knox v. Kelly*, 1 D.

Chap. XI.

be often expedient to ascertain (if possible) by searches at the Exchequer office, and among the Receiver-General's bonds at the Tax office (*p*), that no such liability was subsisting before the 4th June, 1839, when the 2 & 3 Vict. c. 11, came into operation. The claim of the Crown, it may be observed, extends to equities of redemption; and is not defeated by the execution of a power of appointment (*q*), or the assignment of a term already held in trust for the debtor or accountant (*r*); and the lands of an accountant are liable for moneys which become due from him even subsequently to alienation (*s*).

Lis pendens.

It is, as a general rule, proper to search the Register at Westminster for *lis pendens*; this search need not go further back than five years.

Court Rolls
and local
registers.

When the property is copyhold, the Court Rolls (*t*) should be searched for incumbrances, &c., not appearing on the abstract; so, where the property lies in a district subject to the Register Acts, viz. Middlesex, Yorkshire, Kingston-upon-Hull, and the Bedford Level, searches should be made in the local registers: these searches should be extended over the whole period covered by the abstract: copyholds, however, are excepted out of the Register Acts of Yorkshire, Middlesex, and Kingston-upon-Hull (*u*); but it is doubtful whether the exception extends to leases of copyhold estates (*w*).

Bankruptcy
and Insol-
vency
Courts.

In many cases, it may be proper to search the Courts of Bankruptcy and Insolvency; purchasers without notice

(*p*) 1 Jarm. Conv. by S. 112.

(*q*) Prid. on J. 154; *Reg. v. Ellis*,
19 L. J., N. S. 77, Exch.

(*r*) Sug. 673.

(*s*) Sug. 674: as to who are liable
as accountants, see 13 Eliz. c. 4; and
Prid. on J. 159, *et seq.*

(*t*) But the purchaser before ad-
mittance appears to have no right of

inspection: Scriv. on Cop. 493, 4th
ed.: the tenant, or any person claim-
ing an interest under the Court Rolls,
can compel inspection by *mandamus*,
ibid. 532, and cases cited: see *Ex*
parte Cooke, 5 Dow. & L. 413.

(*u*) Scriv. on Cop. 1113.

(*w*) Sug. 980.

were protected by the 2 & 3 Vict. c. 11, s. 12, and 2 & 3 Vict. c. 29, against acts of bankruptcy upon which no fiat had actually issued, the provisions of these Statutes are repealed but in effect re-enacted by the recent Consolidation Act (*x*); and notice of an act of bankruptcy is immaterial, if twelve months have elapsed without a fiat issuing or a petition for adjudication in bankruptcy being filed thereupon (*y*).

Chap. XI.

Sir *E. Sugden* says, that it is "the duty of the purchaser's solicitor to search for annuities" (*z*); Mr. *Jarman*, on the contrary, states that "in ordinary cases the search can scarcely be recommended" (*a*); the general practice is believed to accord with the latter opinion.

Annuities.

We may here remark that the principle of general charges upon property is strongly disapproved of by the present Registration Commissioners (*b*); and that the law upon the subject will not improbably be submitted to the further consideration of the Legislature.

Where the estate has been entailed, or has belonged to married women, it may be proper, in special cases, to search for inrolled deeds and acknowledgments under the 3 & 4 Will. IV. c. 74; but such a search, it is conceived, is not usual in practice, unless there is reason to suspect the existence of suppressed documents.

Recovery deeds and acknowledgments by married women.

(3.) *Time for making searches and inquiries.*

Whatever searches and inquiries are deemed necessary, should, of course, be brought down to a point as close as possible to the time fixed for completion: some practitioners make the search immediately after obtaining an opinion upon the abstract, and a supplemental search

Searches, &c., when to be made.

(*x*) Sect. 133.

(*z*) Sug. 677.

(*y*) 5 & 6 Vict. c. 122, s. 7; 12 & 13 Vict. c. 106, ss. 88, 134.

(*a*) 1 Jarni. Conv. by S. 118.

(*b*) See the 1st Report.

Chap. XI. immediately before completion; but the more ordinary course, it is conceived, is to make but one search, and that immediately before completion.

Unneces-
sary costs of
not allowed.

We may here remark, that a solicitor will not be allowed upon taxation, even as between solicitor and client, the costs of searches directed by counsel, but which have, to the knowledge of the solicitor, been rendered unnecessary by subsequent events (c).

(c) *Langford v. Mahony*, 3 J. & L. 97.

CHAPTER XII.

Chap. XII.

AS TO THE PREPARATION OF THE CONVEYANCE.

1. *General matters relating to, and to the form of.*
2. *As to the parties.*
3. *The recitals.*
4. *The consideration—words of conveyance—and parcels.*
5. *The covenants.*
6. *The draft and engrossment.*

(1.) UPON a sale in consideration of a gross sum, the purchaser, having accepted the title, is bound to prepare the conveyance, and tender it for execution to the vendor (*a*); and reason seems to favour the same rule even where the consideration is a rent-charge, although the practice in such cases appears to be unsettled (*b*).

Purchaser
prepares
conveyance.

A custom in a manor, that the steward shall prepare all surrenders for a reasonable fee, appears to be valid (*c*).

Manorial
custom, that
steward
prepare all
surrenders,
is valid.

Even if a contract for purchase of an equitable interest can in itself amount to a conveyance (*d*) the purchaser is entitled to a formal assurance, if such appears by the contract to be necessary in order to carry the intention of the parties into effect (*e*).

Conveyance
of equitable
interest.

As we have already seen (*f*), the preparation of the

Preparation

(*a*) Sug. 263.

(*d*) But see, as to this, *supra*, p.

(*b*) 9 Jarm. Conv. by S. 518.

115.

(*c*) *Rex v. Rigge*, 2 B. & Al. 550;

(*e*) *Fenner v. Hepburn*, 2 Y. &

Reg. v. Bishopstoke (Lord of Manor of), 8 Dowl. P. C. 608.

C. C. C. 159.

(*f*) *Supra*, p. 218.

Chap. XII.

of conveyance no acceptance of title.

Whether purchaser can require outstanding interests and incumbrances to be got in by separate deed.

May require confirmation of doubtful title by separate deed, *semble*.

All unnecessary matters and parties to be

conveyance is not, necessarily, a waiver of objections to or requisitions upon the title. /

It has been held, that a purchaser cannot compel the vendor to get in an outstanding equitable interest by a deed distinct from the general conveyance (*g*) ; it is, however, conceived, that this doctrine must be applied with hesitation (*h*) ; and that, subject to the question of expense (*i*), a purchaser may generally object to have his conveyance incumbered with matter arising from the complicated state of the title (*k*) : indeed it may often, especially when the property is likely to be much sub-divided, be most desirable to avoid any reference upon the conveyance to a voluminous although apparently satisfactory earlier title.

So, it is conceived, that (subject to the question of expense) a purchaser may insist on keeping off the face of his conveyance any matter which, although agreed to be waived as an objection, yet tends to throw a doubt upon the title ; or any collateral matter which may hereafter embarrass the proof of the title : if, for instance, trustees were to sell under circumstances not necessarily appearing upon the face of the conveyance, but amounting to a breach of trust, and the *cestuis que trust* agreed to confirm the sale, the purchaser might, it is conceived, insist upon taking this confirmation by a separate deed ; for to include it in the conveyance would oblige him upon a resale to prove who were the parties beneficially interested, and might give rise to questions which would have been wholly immaterial to a sub-purchaser without notice of the breach of trust.

It may, in fact, be laid down as a general rule in preparing conveyances, that not only should all objectionable

(*g*) *Reeves v. Gill*, 1 Beav. 375.

(*h*) Sug. 690.

(*i*) As to which, *vide infra*, Ch.

(*k*) See *Jones v. Lewis*, 11 Jur.

511 ; and 1 De G. & S. 245 ; stated

infra.

or doubtful matter be kept off the title, but that nothing should be brought on to it the introduction of which is not evidently necessary or expedient; in proportion as additional matter is introduced into a deed, and additional persons are made parties to it, the chances of some error or ambiguity existing in it are increased.

Chap. XII.
kept off conveyance.

So, a purchaser from a tenant in tail, may, it is submitted, insist upon the property being disentailed by a separate deed; and may reasonably object to any unnecessary exposure of his title in a public office.

Disentailing deed to be kept distinct from conveyance.

The Lands Clauses Consolidation Act, 1845, and the earlier Railway and other similar Acts, contain statutory forms of conveyance to the several Companies; but the use of these forms, in preference to the ordinary instruments of assurance, is not obligatory, or usual; nor does it appear to be expedient (*l*).

Statutory forms of Railway Conveyances ineligible.

The same remarks apply, and with greater force, to certain short forms authorized by Acts passed in the Session of 1845 (*m*); such enactments are either unnecessary or mischievous;—unnecessary, if the parliamentary form would, if unauthorized by Parliament, merely express in fewer words the meaning of the forms in ordinary use; and mischievous, if an unnatural and secondary meaning is given by Statute to words which are *primâ facie* clear and intelligible; for the effect is, to increase the difficulty of legal documents to the unprofessional reader: for instance, a lessee who has, in the usual way, covenanted not “to carry on any trade or business” upon the demised premises, may feel a reasonable and saving doubt whether he is safe in using them for a school (*n*); but, unless more addicted than is customary to the perusal of Acts of Parliament, he probably will scarcely suspect that such an occu-

So are the short parliamentary forms of 1845.

(*l*) Frend & Ware’s Rail. Conv. 133.

(*n*) See *Doe d. Bish v. Keeling*, 1

(*m*) See 8 & 9 Vict. c. 119; and, M. & Sel. 95.

as to Leases, c. 124.

Chap. XII.

pation is forbidden by an engagement, not to "use premises as a shop;" which is, nevertheless, the statutory equivalent to the ordinary covenant (*o*).

Incumbrances, upon a sale in lots to be got in by separate deed.

Upon a sale in lots of an estate subject to an incumbrance which is to be paid off out of the purchase-money, much expense may be saved by taking a release to the vendor, instead of making the incumbrancer concur in the several conveyances; and this, when the parties are on good terms, is usually acceded to; although it might, probably, be resisted, either by a purchaser, or by the incumbrancer.

Incumbrances kept on foot for purchaser's benefit should be assigned to trustee, or declaration of trust should be taken.

Where, as is often desirable, a subsisting incumbrance is to be kept on foot for the purchaser, a mere declaration of intention should not be relied on, but the sum itself, and also the term for years, if there be one for securing it, should be assigned to a trustee for the purchaser: or a declaration of trust should be executed by the incumbrancer (*p*), and the legal owner of the term.

Distinct estates or matters should be dealt with by separate deeds.

And it may be remarked, that it is generally inexpedient, and, eventually, false economy, to comprise several distinct estates or matters in a single deed.

As to Act for mortgage of satisfied terms; — to what it applies.

As a general rule, the assignment of satisfied terms is rendered unnecessary or impracticable by the Act of 8 & 9 Vict. c. 112: the Act, however, does not appear to extend to copyholds, or customary freeholds (*q*); and it seems doubtful whether either the 1st or 2nd section extends to any hereditaments other than "land" technically so called (*r*).

Doe v. Price.

Where, before the passing of the Act, A., who although not in fact, yet believed himself to be, the owner of a

(*o*) See 2nd schedule to 8 & 9 Vict. c. 124.

(*p*) *Medley v. Horton*, 14 Sim. 226, 229; *Watts v. Symes*, 16 Sim. 640; see, on the same subject, Coote

on Mortgages, 3rd ed. 394; 9 Jarm. Conv. by S. 213, 214.

(*q*) See Dav. Concise Conv. Prec. 3rd ed. 79.

(*r*) *Ibid.* 75, 79.

freehold estate, mortgaged it to B., and an old term for years was at the same time assigned to a trustee, in trust for B. and to attend the inheritance, it was held, that this term could not, after the 31st December, 1845, be used in ejectment on behalf of a person claiming the estate by a title paramount to that of A., although it might, if requisite, have been used as a defence by B. (*s*).

In a later case, where, before the passing of the Act, a term was declared to be held in trust for securing a mortgage debt, (part of which was money for securing which the term had been originally created, and the entirety of which was secured by, as was supposed, a mortgage of the reversion in fee,) and subject thereto in trust for A. and B., who were supposed to be entitled to the equity of redemption in fee, but the reversion in fee, expectant on the term, was in fact vested in X. under a prior concealed conveyance, and in 1847 A. paid off the mortgage, and subsequently brought an ejectment against X. on the demise of the trustee of the term, the Court of Queen's Bench intimated a doubt whether the payment of the sum due on the original security, by a person supposed to be but who was not in fact the owner of the equity of redemption, rendered the term a satisfied term within the 2nd section of the Act: and held that, at any rate, the term had not become attendant on the inheritance, either by express declaration—there having been no such declaration—or by construction of Law,—for the trust was expressly declared to be for A. and B., who had not the inheritance, although they were supposed to be entitled thereto when the declaration of trust was executed,—and that the term was therefore still in existence (*t*). This decision, and the accompanying dictum, which, if correct,

*Doe v.
Jones.*

(*s*) *Doe v. Price*, 16 M. & W. 603; and see *Doe v. Moultsdale*, *ibid.* 689. (*t*) *Doe d. Clay v. Jones*, 13 Jur. 824.

Chap. XII.

would materially restrict the operation of the 1st section, and go far to reduce the 2nd section of the Act to a dead letter, are not understood to have met with general approbation, or to have materially affected the practice of conveyancers.

(2.) *As to the parties.*

Who must
be parties to
conveyance.

All persons whose concurrence is necessary in order to give to the purchaser the full benefit of the contract, must, of course, be parties to and execute the conveyance.

Judgment
creditors
who might
proceed at
Law, al-
though
they would
be re-
strained in
Equity.

And if the title be such that judgment creditors could at Law take the property in execution, this alone will entitle the purchaser to require their concurrence; even although Equity might by injunction restrain the exercise of their legal right (*u*).

Stipulation
that unne-
cessary par-
ties shall
concur, is
binding.

And where it is a term of the contract that certain specified persons shall concur, the vendor cannot decline to procure their concurrence on the ground that they are in fact unnecessary parties (*v*).

Purchaser
from mort-
gagee, under
power of
sale, cannot
require con-
currence
of mort-
gagor.

Upon a sale by a mortgagee under a valid power of sale duly exercised, the purchaser cannot require the concurrence of the mortgagor (*w*); although by the mortgage deed the latter agreed to join in any sale, if required (*x*).

As to
making
bankrupt a
party on
sale of his
estate.

Upon the sale of a bankrupt's estate, he is usually made to convey and covenant for title (*y*): his covenants, however, are obviously of little value; and it would seem that he cannot be compelled to execute the conveyance (*z*): but the Court of Bankruptcy is empowered (*a*) upon the application of the assignees, or of the purchaser, if the bankrupt

(*u*) *Craddock v. Piper*, 14 Sim. 344.
310.

(*y*) Sug. 706.

(*v*) *Benson v. Lamb*, 9 Beav. 502.

(*z*) 3 Dav. Conv. 413.

(*w*) *Clay v. Sharpe*, Sug. 523;

(*a*) See 12 & 13 Vict. c. 106, s.

Allen v. Martin, 5 Jur. 239, R.

148; and 6 Geo. IV. c. 16, s. 78.

(*x*) *Corder v. Morgan*, 18 Ves.

shall not try the validity of the adjudication, or if there shall have been a verdict at Law establishing its validity, to order the bankrupt to join in the conveyance; and if he do not execute it within the time directed by the order, then he, and all persons claiming under him, will be stopped from objecting to such conveyance; and all estate, right, or title, which he had in the property, will be as effectually barred as if such conveyance had been actually executed by him: the order would appear to be of course if he do not dispute the validity of the adjudication (*b*). It seems doubtful whether a purchaser can, in ordinary cases require the assignees to procure such an order unless he can throw a doubt upon the validity of the adjudication: if he himself apply for it, the costs would seem to be in the discretion of the Court (*c*).

As respects dower, in cases falling under the new law, the concurrence of the wife is, of course, unnecessary; the conveyance by the husband alone being a sufficient bar: in cases falling under the old law, it has been held that the purchaser could not insist on the wife's concurrence if he could obtain an assignment of a legal term for years created previously to the right of dower attaching upon the estate, and of sufficient duration (*d*); inasmuch as, if the wife proceeded for her dower at Law, she could recover it only with a *cesset executio* during the term, and Equity would not remove the bar (*e*): this, however, does not seem to be a satisfactory reason for the doctrine; as not only was the purchaser obliged to incur the expense of keeping the term on foot, but he would have had to pay at least his own costs at Law in the event of the dowress availing her-

Dowress, when to be made a party.

Assignment of term, whether purchaser must rely on, as a bar.

(*b*) *Ex parte Bradstock*, 1 Mon. D. & De G. 118.

(*c*) See note to 9 Jarm. Conv. by S. 261.

(*d*) Sug. 541; *Mole v. Smith*, Jac. 490; *Maundrell v. Maundrell*, 7 Ves.

567; 10 Ves. 246.

(*e*) Sug. 541.

Chap. XII.

self of her legal remedy (*f*) : and it would appear that a purchaser can at any rate require the vendor to ascertain, if practicable, whether or no a liability to dower exists, and is not bound to be satisfied with a reply that if such liability exist he may protect himself by means of a term (*g*). It has been recently decided, by V. C. *K. Bruce*, that an old term for years which upon a purchase prior to the 1st January, 1846, (when the 8 & 9 Vict. c. 112 (*h*) came into operation,) was duly assigned to a trustee for the purchaser, is a sufficient protection to a sub-purchaser, purchasing on or after the 1st January, 1846, against the dower of the wife of the original vendor (*i*) ; but such a term, it is conceived, would be no protection to the sub-purchaser against any claim to dower by the wife of such first purchaser ; supposing him to have been seised in fee on the 1st January, 1846. Where a jointure is relied on in bar of dower, the vendor, it would seem, must produce a satisfactory title to the jointure land (*k*).

Jointure.

(3.) *As to the recitals.*

Recitals to
be used
with what
object.

A difference exists among conveyancers as to the legitimate use of recitals: some practitioners employing such only as will give an insight into the interests and objects of the parties to the deed, sufficient to render the subsequent parts clear and intelligible ; while others introduce matter which although clearly irrelevant, *e. g.*, the recital of the probate of a will of real estate, or of the places of burials, marriages, and baptisms, &c., is yet calculated to save trouble upon future investigations of the title: it is submitted, that, as a general rule, no recital

(*f*) See Mr. Jarman's note, 1 Jarm. Conv. by S. 508.

(*g*) *Major v. Ward*, 12 Jur. 473, V. C. W.

(*h*) Rendering the assignment of satisfied terms unnecessary.

(*i*) *Bass v. Wellsted*, 12 Jur. 347.

(*k*) Sug. 542.

should be admitted which has not a logical connection with some operative part of the draft, and that the purpose of the other class of recitals may be well answered by a memorandum indorsed on the deed, and signed by the parties conversant with the facts.

So, in disentailing deeds, whose statutory effect is independent, not only of the motives, but even of the expressed intention of the parties (*m*), recitals seem to be in general useless, and therefore inexpedient; especially, since the enrolment of these conveyances in a public office is open to all the objections, and is attended by few of the benefits, incident to registration of titles under the protective Statutes: a simple conveyance by A. of a specified estate, or of all the lands held by him as tenant in tail under a specified settlement or in a specified locality, and the mere consent of B. as protector, either generally or under the limitations of any specified instrument, are quite as effective, and in the general as intelligible, as they would be if preceded by the most elaborate statement of the previous title, or of the motives which induce the parties to do that which, when done, takes effect without any regard to motive.

In a late case, a question was raised and not decided, whether, when a purchase-deed contained a recital of the vendor's title, the purchaser upon being evicted was not estopped from questioning the accuracy of such recital in an action on the covenants for title (*n*): the contrary appears however to have been decided in a later case (*o*) where the Court held that where a recital is intended to be the statement of one party only, the estoppel is confined to that party; and the intention is to be gathered from construing the instrument.

Whether
desirable in
disentailing
assurances.

Of vendor's
title; whe-
ther pur-
chaser
estopped
thereby.

(*m*) See 3 & 4 Will. IV. c. 74, 310.
s. 21. (o) *Stronghill v. Buck*, 15 L. T.,
(*n*) *Young v. Raincock*, 7 C. B. 22, Q. B.; 14 Jur. 741.

Chap. XII.

Whether
written
agreement
should be
recited in
subsequent
deed

Where a deed is executed pursuant to a written agreement, it is generally inexpedient to recite that agreement, and so bring it upon the title, unless it be material to the full operation or validity of the deed; as in the case of a post-nuptial settlement, where it is generally proper to recite prior articles, in order to show that the settlement is not voluntary.

Recitals of
objections
in deed of
confirmation.

Where a person executes a deed for the purpose of removing objections to the title, and the deed merely mentions their existence, without specifying them or showing that objections have been withheld from him, and he asks no questions, he will, as between himself and the purchaser, be bound, although in fact unaware of their real nature (*p*): and it is presumed, that a person executing such a general confirmation, even although in fact deceived as to the real nature of the objections, would be bound, if the purchaser had no notice of the deception: a general confirmation would appear to be the most eligible for the purchaser; but the party confirming should insist on the particular objections being specified, and should in terms confine his confirmation to their removal.

(4.) *As to the consideration—words of conveyance—
and parcels.*

Consideration—to be truly stated.

Care must be taken in preparing the deed to state truly the consideration paid by the purchaser, and upon which *ad valorem* duty will have to be paid; as the omission to do so, although it will not affect the sufficiency of the stamp or the validity of the deed (*q*), will expose the parties who prepare the deed to severe penalties, and the vendor to an action by the purchaser for the return of the unexpressed consideration (*r*); where fixtures, standing

Duty pay-

(*p*) 8 Ves. 431.

250.

(*q*) Tilsley on Stamps, 1st ed.

(*r*) See 48 Geo. III. c. 149, ss. 22

timber, or any other parts of the inheritance are taken at a valuation, its amount must be included in the consideration; but moveable chattels which pass by delivery may be handed over, and receipts may be given for them and for their price; if, however, they be for any reason assigned by deed, the *ad valorem* duty attaches, and their price must be stated; and it would appear from a recent case that the recital in a deed of such sale and delivery (which has been very frequent in practice) renders the duty payable, unless the articles are of such a kind as would come under the description of goods, wares, or merchandize (*s*). Upon the purchase of an equity of redemption the mortgage debt is subject to duty, and its existence must therefore appear upon the face of the deed (*t*); where freeholds or leaseholds are purchased together with copyholds, at an entire price, it is necessary, for the purposes of the Stamp Act (*u*), to apportion the price between the copyholds and the other property (*t*); and this may be done so as to reduce the duty to a minimum, without any regard to the actual relative values of the estates; so, where estates are purchased by two or more at an entire sum, and the purchasers take separate conveyances, or where estates of different tenures or held under different titles are purchased at an entire sum, but are conveyed to the purchaser separately by separate instruments, the purchase-money may, for the purpose of diminishing the duty, be apportioned on the face of the conveyances without regard to the actual value of the estates, or (in the case of there being several

Chap. XII.

able on fixtures, timber, &c.

As to chattels passing by delivery.

Recital of sale—its effect.

Apportionment of consideration, on purchase of copyholds and other property.

to 26; 55 Geo. III. c. 184, s. 8; *Gingell v. Purkins*, 19 L. J., N. S. Exch. 129. See also 13 & 14 Vict. c. 97, s. 10, remitting penalties incurred prior to the 20th March, 1850, in respect to the omission from leases of the compensation paid by the lessee to the party who held the original

agreement for the lease; see *Att.-Gen. v. Brown*, 3 Exch. 662.

(*s*) *Horsfall v. Hey*, 2 Exch. 778.

(*t*) 55 Geo. III. c. 184, Sched. title "Conveyance."

(*u*) Inasmuch as the duty upon the copyholds is charged on the surrender.

Chap. XII.

purchasers) to the pecuniary arrangements between the parties: but under the new scale of duties only a very trifling saving can be thus effected.

Sale in consideration of transfer of stock or grant of annuity.

And where before the 11th October, 1850 (*w*), the consideration was the actual transfer of a sum of stock, or the grant of an annuity or rent-charge of uncertain duration, as no *ad valorem* duty was payable, no penal liability was incurred by omitting to state, or by misstating the consideration: and this seems to be still the case as respects the grant of the annuity or rent-charge; but under the late Act, where the consideration consists wholly or in part of any stock or security, the value thereof is to be considered as purchase-money, and to be stated in the conveyance; and is to be ascertained as follows, viz., in the case of stock in any of the public funds, or any Government debenture or stock of the Bank of England or Bank of Ireland, or any debenture or stock of any corporation, company, society, or persons or person, payable only at the will of the debtor, according to the average selling price thereof respectively, on the day or on either of the ten days preceding the date of the conveyance, or if no sale shall have taken place within such ten days then according to the average selling price thereof on the day of the last preceding sale; and in the case of a mortgage, judgment, or bond, or a debenture, the amount whereof shall be recoverable by the holder, or any other security whatsoever, whether payable in money or otherwise, then according to the sum due thereon for both principal and interest (*x*).

Compen-

In the case of a conveyance under the Lands Clauses

(*w*) This date should be inserted, *supra*, p. 109, instead of 10th Oct.

(*x*) Schedule to 13 & 14 Vict. c. 97; *quære*, whether either this or the general Stamp Act provides for the case of a conveyance in satisfaction

of a simple-contract debt already *bonâ fide* due to the purchaser? See, however, *Gingell v. Purkins*, 19 L. J., N. S. Exch. 129. As to the amount of duty, see next Chapter.

Consolidation Act, or any Act of Parliament containing similar provisions, care should, of course, be taken, that the sum expressed to be paid as the consideration for the purchase of land, does not include money paid merely by way of compensation for damage to adjacent property ; as the latter amount is not subject to duty.

Chap. XII.

sation money on sale to Railway Company.

Except in the case of a feoffment (a mode of conveyance which is seldom adopted except on sales by a Corporation) it has become unusual to insert the operative words of conveyance in the past as well as in the present tense (*y*).

Operative words used only in present tense.

The reference to the Statute which rendered a lease for a year unnecessary, although still of frequent occurrence, is rendered useless by the subsequent enactment, that all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be held to lie in grant as well as in livery (*z*).

Reference to Act dispensing with lease for year unnecessary.

It is still the general practice, even when the purchaser has no wife to whom he was married before the late Dower Act came into operation, to convey the estate, if freehold

Dower uses — whether to be inserted.

(*y*) Freehold lands in possession in the Australian Colonies are, it is understood, generally conveyed by feoffment. As to real property in the East Indies, see *Freeman v. Fairlie*, 1 Moore's Ind. App. 305 ; and *Gardiner v. Fell*, 1 J. & W. 22. Except in Calcutta, and those localities where land has been acquired and subsequently sold by the Indian Government, there does not appear to be any real estate which can be considered as held in fee simple ; the ordinary English conveyances are, however, generally adopted in transactions between Europeans ; of course, in preparing in England a conveyance of land in India, treated as freehold, the recent Acts would not enable the draftsman to dispense with a lease for a year ; as to the

forms of conveyance in the North American Colonies, and West India Islands, see Appendix to Burton's Compendium, and 2 Jarm. Conv. by S. 398 *et seq.* Our Courts will apply the general law of this country (being abstractedly just, and not exclusively founded on any peculiar or technical rule) to questions relating to land in a colony where a different system of jurisprudence prevails, unless it is shown or suggested that the Laws of the Colony are different on the point in question : *Ben-tinck v. Willink*, 2 Ha. 1. As to the assurance of customary freeholds, see the late case of *Graham v. Jackson*, 6 Q. B. 811, and authorities there cited.

As to forms of conveyance in the Colonies.

(*z*) 8 & 9 Vict. c. 106, s. 2.

Chap. XII.

of inheritance, to the ordinary uses to bar dower, in order to avoid the necessity, on future sales, of proving the non-existence of any such wife; where, however, the draftsman is aware that no such wife exists, it seems to be sufficient to recite the fact; the purchaser himself should, if practicable, be the releasee or feoffee to uses.

Parcels,
how to be
described.

In describing the parcels, a description by reference to a schedule, or to a schedule and map, has become as usual as it is convenient (*a*). It has been held that the steward of a manor may insist upon a surrender containing a substantive description of the tenements, and may object to a mere reference to the description in a former surrender (*b*).

Mines, &c.,
if pur-
chased by
Railway or
Waterworks
Company
must be
specified.

In a conveyance to a Railway or Waterworks Company, if within the provisions of the recent Consolidation Acts, care must be taken to specify the mines and minerals, if intended to be included; for, unless actually specified, they will not pass (*c*).

(5.) *As to the covenants.*

Covenants
for title.

The covenants for title are that part of the draft upon which disputes and questions of difficulty most frequently arise; they are of considerable, although, perhaps, to a purchaser, of rather over-estimated importance; to the solicitor they are important, inasmuch as he will be responsible to his client for permitting him unknowingly to enter into improper covenants (*d*); or for not securing to him those to which he is entitled from the other party.

Solicitor's
liability in
respect
thereof.

(*a*) See, as to the effect of a variance between a schedule to a conveyance and an indorsed map, *Llewellyn v. Earl of Jersey*, 11 M. & W. 183; and, as to the schedule and map restricting the description in the body of the deed, *Barton v. Dawes*, 19 L. J. 302. See, too, the 1st Report of the present Registration Commis-

sioners, recommending maps as the basis of a General Register.

(*b*) *The Queen v. Lord of the Manor of Bishop's Stoke*, 8 Dowl. P. C. 608.

(*c*) See 8 & 9 Vict. c. 20, s. 77; 10 & 11 Vict. c. 17, s. 18.

(*d*) *Stannard v. Ullithorne*, 10 Bing. 491.

A vendor, if the absolute beneficial owner, enters into the usual covenants that he has good right to appoint and release, assign, or surrender (as the case may be, according as the estate is freehold, leasehold, or copyhold), for quiet enjoyment, free from incumbrances, and for further assurance (*e*).

Chap. XII.

What covenants entered into by absolute beneficial owner.

It is usual to insert in a conveyance by appointment a covenant that the power was well created and is subsisting; and in an assignment of leaseholds, a covenant that the lease was a valid demise and that the term is subsisting; but these covenants are, in effect, comprised in the covenants for right to appoint and for right to assign; and consequently are often omitted: the vendor of leaseholds also covenants that the rent has been paid up to the last day of payment, and that all other the lessee's covenants have been performed up to the date of the assignment.

What usual covenants by, may be omitted.

The covenants of such a vendor, if he have acquired the estate by purchase for money or other valuable consideration, are extended to the acts of himself (*f*) and parties claiming under him; it is conceived, that marriage is for this, as it is for other purposes, a valuable consideration, even as in favour of collaterals (*g*); but, in practice, it is usual for a vendor claiming under a marriage settlement to covenant against the acts of the settlor and his representatives (*h*).

To whose acts his covenants extend.

It appears to have been formerly held that the Court of Chancery would not compel a vendor to enter into covenants extending back further than the acts of the last owner (*i*); but where such owner himself acquired the estate otherwise than by purchase, the "universal and settled practice of conveyancers" (*k*) is, to make the cove-

Difference between practice of Conveyancers and rule of the Court.

(*e*) See *Church v. Brown*, 15 Ves. 698.
263, 264.

(*h*) 9 Jarm. Conv. by S. 375.

(*f*) Sug. 702.

(*i*) *Loyd v. Griffith*, 3 Atk. 268.

(*g*) *Davenport v. Bishop*, 1 Ph.

(*k*) Sug. 704.

Chap. XII.

Owner covenants, on sale by Court or by Trustees.

As to landowners' covenants on sale to Railway Company.

Liability of tenants for life to covenant.

nants extend to the acts of all prior owners up to and inclusive of the last purchaser: and the Courts would probably at the present day be inclined to sanction such practice by decision.

The owner of an estate sold by order of the Court, or by his own trustee for sale, enters into the same covenants as if he himself were selling (*l*).

It appears to be the general notion that landowners agreeing to sell land to Railway and other similar companies must enter into the usual covenants for title; the liability can hardly be questioned in respect of land which the Company has no power to take compulsorily; such as land required for extraordinary purposes (*m*); but as respects land which the Company has power to take compulsorily, the landowner's contract, although apparently voluntary, is scarcely so in fact; and his liability to enter into covenants may be considered doubtful in principle, and not supported by any satisfactory authority; for in "*Re the London Bridge Act*," (*n*) there was the important fact—although not noticed in the judgment—of the enabling Act having been obtained by the vendors pursuant to an agreement with the purchaser: it is, however, believed to be the general practice for such owners to covenant; and the practice would probably, if necessary, be supported by decision. As respects landowners who have entered into no agreement, but as against whom the entire proceedings of the Company have been compulsory, it is conceived that they are not bound, and do not in ordinary practice consent, to enter into any covenant (*o*).

It has been recently decided by Sir L. Shadwell, V. C., that the first and second tenants for life of a settled estate, selling under a private Act of Parliament which they them-

(*l*) Sug. 703.

(*n*) Cited *infra*.

(*m*) 8 & 9 Vict. c. 18, ss. 12 and 13.

(*o*) Frend & Ware's Rail. Conv. 136.

selves, pursuant to an agreement with the purchaser, had obtained for the purpose, were bound to enter into the usual covenants for title; the Court assuming that upon a sale under a power with the consent of the tenant for life his obligation so to covenant was a matter of course (*p*).

In the above case the statutory vendors were tenants for life under a will, and the covenants for title were extended to acts of their testator; the question, whether they were properly so extended, does not appear to have been much considered; and it is submitted, that, although a tenant for life or other owner of a particular estate may be required so to covenant in respect of his own beneficial interest, yet that, as respects the reversion, (in which he has *no* beneficial interest) his covenants should be confined to the acts of himself and parties claiming under him; considering the present frequency of such sales the point is one of some practical importance.

To whose acts their covenants should extend.

Upon a sale, by husband and wife, of the wife's unsettled freehold or copyhold estate, the husband, since he either does or may receive the purchase-money, covenants for title as upon the sale of his own estate: and if there be any doubt as to the fact of marriage, the woman should herself enter into usual covenants, and it is submitted that a purchaser might require their introduction.

Covenants on sale, by husband and wife, of wife's estate.

As a general rule, fiduciary vendors only covenant that they have done no act to prevent their selling, or to incumber the property (*q*); a covenant for further assurance would seem to be a reasonable addition, and is often attempted to be introduced; but it is settled that trustees cannot, as defendants, be compelled to enter into it (*r*): it has, however, been held, that the heir at law and assignees

Vendors, who are not beneficial owners, covenant only against incumbrances.

(*p*) *Re London Bridge Acts*, 13 *ris*, 1 V. & B. 8.

Sim. 176, 179.

(*r*) *Worley v. Frampton*, 5 Ha.

(*q*) 11 Ves. 345; *Staines v. Mor-* 560.

Chap. XII.

Rule, whether universal.

in bankruptcy of an intended lessor are bound, to the extent of their interests in the property, to enter into special covenants which the intended lessor had contracted to enter into (*s*) ; and the decision would apparently apply to the case of an agreement for sale and for special covenants by the vendor : the cases seem to show, that where mere trustees, &c., have themselves entered into the contract, or where the contract of the party whom they represent is sought to be enforced against them, the rule against their entering into any covenants other than the covenant against incumbrances, &c., is invariable ; but that it is not settled whether, if they themselves come into equity to enforce the contract of the party whom they represent, they must not covenant for further assurance.

Incumbrancer releasing.

An incumbrancer who releases the estate, whether voluntarily or in consideration of payment, only covenants that he has done no act to encumber.

Crown gives no covenants.

A purchaser from the Crown can require no covenants for title (*t*).

Covenants by parties interested in purchase-money.

Upon a sale by trustees under a will, for general purposes, or by order of the Court, the purchaser is not entitled to any covenant but that against incumbrances ; except (in the case of a will) where the purposes to which the purchase-money is primarily applicable have since been satisfied, so that the substantial owners are in fact ascertainable ; in practice, however, it is usual in any case to insert covenants by the parties who are beneficially entitled in any considerable amount to the residue of the purchase-money (*v*).

Covenant against known defect.

Any covenant intended to provide for a defect in title which appears on the face of the conveyance, should be so expressed ; if the defect can be kept off the face of the

(*s*) *Page v. Broom*, 3 Beav. 36.

(*t*) Sug. 705.

(*v*) Sug. 704 *et seq.*

conveyance (which is generally the case) the covenant should be entered into by a separate instrument (*w*), which should refer to the defect; or there should be an agreement signed by the covenantor admitting the existence of the defect, and stating that the same is intended to be included in the covenant (*x*).

So, a covenant for production of title deeds, if it extend to documents not noticed in the conveyance, should, as a general rule, be entered into by a separate deed; the question to be considered is, whether any document covenanted to be produced is of such a character as to make it desirable that it should, so soon as practicable, be taken off the title.

Covenant
for pro-
duction of
deeds.

A purchaser is entitled to a valid covenant for the production, and probably for the right to take copies (*y*), of such documents of title as are not delivered over to him (*z*); commencing with such as are necessary to show a marketable title (*a*), and excepting such copies of Court Roll and inrolled deeds, (if inrolled under any Act which makes the inrolment evidence,) as are not in the possession or power of the vendor (*b*); in the absence of agreement, he is not bound (*c*), (except upon a sale by assignees of a bankrupt (*d*),) and, perhaps, cannot be advised, to assent to the introduction of the ordinary proviso for determining the vendor's liability upon his selling the residue of the property and procuring a substituted covenant to be entered into by the person who will upon such sale become the holder of the deeds; but on a sale by fiduciary ven-

Purchaser's
right to.

(*w*) Sug. 702.

(*b*) *S. C.*

(*x*) *Vide infra*, Ch. XIV.

(*c*) Sug. 478.

(*y*) Sug. 479.

(*d*) *Ex parte Stuart*, 2 Rose, 215,

(*z*) *Barclay v. Raine*, 1 Sim. & Stu. 449.

(*a*) *Dare v. Tucker*, 6 Ves. 460;
Cooper v. Emery, 1 Ph. 388.

L. C.; where the Court stated, generally, that the assignees' covenant should be confined to the time of their continuance as assignees.

Chap. XII.

dors it is usual to insert such a proviso (*e*), and its insertion should be stipulated for on their behalf.

To what documents it extends.

But the right to a covenant for production is, as a general rule, confined to those documents which affirmatively evidence the vendor's title (*f*), and does not extend to those which are required to negative mere possibilities; it appears, in fact, to have been decided by Sir *L. Shadwell*, V. C. (*g*), that a purchaser from an heir at law, whose ancestor left a will not affecting the property, can require no covenant for its production; this decision seems, however, to conflict in principle with that in a case (*h*), where a purchaser from an heir under similar circumstances, was, upon selling again, held bound to produce the will if in existence for the inspection of the sub-purchasers.

In order that the covenants for production may run with the land in respect of which the deeds are retained, it is necessary that the covenantor should be seised of the legal estate in such land (*i*): this however is a point not often attended to; and if a purchaser has a right to insist upon it, such right would seem to involve the additional right of requiring the title to such other land; a purchaser it is conceived, could scarcely be advised to press the point.

With whom vendor's covenants should be entered into.

The vendor's covenants, if the estate be freehold, should be entered into with the grantee, releasee, or feoffee to uses (if any): if the estate be copyhold, it appears to be the preferable practice, instead of taking a covenant to surrender with covenants for title and production in the same deed, to let the surrender precede the execution of the deed containing the covenant for title and production;

(*e*) 5 Dav. Conv. 595.

(*h*) *Stevens v. Guppy*, 2 Sim. &

(*f*) Including of course deeds of covenant for production entered into by prior vendors; Sug. 478.

Stu. 439.

(*i*) Sug. 479, 731; even then, the result is not free from doubt; *vide*

(*g*) *Cooper v. Emery*, cited in Hayes on Conv. 573, 3rd ed.

infra, Ch. XIV.

as, if the former course be adopted, it is not clear that the covenants will run with the bond (*k*).

Chap. XII.

On the other hand the vendor may, in certain cases, require covenants on his own account; for it may be laid down as a general rule, that whenever he is personally subject to liabilities, either in respect of the estate, or for the performance of which the estate stands as a security, the purchaser, in taking the estate, must undertake the liabilities, and covenant to indemnify the vendor against them.

Purchaser's covenants with vendor.

For instance, on the sale of an equity of redemption the purchaser must covenant to pay the mortgage debt and future interest (*l*).

On purchase of equity of redemption,

So, on the sale of leaseholds, either by the original lessee or by an assignee who has entered into a similar covenant with a prior owner, the purchaser must covenant to pay the rent and perform the covenants contained in the lease, and to indemnify the vendor against the same (*m*).

or leaseholds,

The same rule would, it is conceived, apply to the sale of freehold land subject to quit-rent which the vendor is under a personal liability to pay: so, where a vendor of freeholds had, on his own purchase, covenanted to observe the covenants entered into by a former owner, and which prohibited building upon the land, he was held to be entitled to a similar covenant from a purchaser who bought with notice of the restriction, and filed a bill for specific performance (*n*).

or freeholds subject to quit-rent, or covenants for or upon which vendor is liable.

Upon the same principle, when the vendor has covenanted with a former purchaser for the production of the deeds, a purchaser of the residue of the estate, if he take

For production of deeds.

(*k*) 3 Dav. Conv. 306; 9 Jarm. Conv. by S. 188.

Beav. 112; *Cochrane v. Robinson*, 11 Sim. 378.

(*l*) *Ibid*.

(*n*) *Moxhay v. Inderwick*, 1 De

(*m*) *Staines v. Morris*, 1 V. & B.

G. & S. 708.

8; and see *Close v. Wilberforce*, 1

Chap. XII. the deeds, must covenant for their production to the first purchaser (*o*).

Agreement against using land in specified manner—performance of, how to be secured in conveyance.

Where the contract for sale was that the conveyance should be made subject to certain specified stipulations as to the mode of building upon the land, and also to “a covenant on the part of the purchaser, his heirs and assigns, and proper provisions for securing the due observance and performance thereof,” it was held that the conveyance should contain, not only the covenant, but also a power for the vendor or his representatives to enter and remove any buildings erected in breach of such covenant, and to retain possession until payment of the consequent expenses; but that he was not entitled to have a term for years, or a rent charge, limited to a trustee by way of security for the performance of the covenant (*p*).

Vendor of minerals, entitled to power to enter and ascertain state of workings.

Under an agreement to purchase the minerals under a given surface, the price to be payable by instalments, and the payments to be accelerated if more than a given quantity of minerals be gotten from time to time, the vendor is entitled to a covenant in the conveyance, reserving to him a right of entry for the purpose of ascertaining the state of the workings (*q*).

Purchaser in consideration of annuity, covenants for payment.

Under an agreement to purchase land in consideration of a life annuity, “to be charged on the land,” the vendor is entitled to, not only the charge, but also, the purchaser’s covenant for payment (*r*).

Purchaser when bound in Equity by covenants, although he do not execute.

And a purchaser who accepts the benefit of the conveyance, will be bound in Equity by the covenants on his part therein contained, although he do not execute it (*s*).

(*o*) *Vide infra*, ch. xiii.

176.

(*p*) *Ex parte Ralph*, 1 De Gex, 219; see the form given, p. 228.

(*r*) *Bower v. Cooper*, 2 Ha. 408.

(*s*) *Willson v. Leonard*, 3 Beav.

(*q*) *Blakesley v. Whieldon*, 1 Ha.

373.

(6.) *As to the draft and engrossment.*

When the draft has been approved, any alteration made in it should be communicated to the other party before engrossment (*t*); where the alterations merely consist in omissions of passages introduced by such other party, or can otherwise be easily pointed out, it is submitted, that the opposite solicitor (who must be presumed to have retained a copy of the draft) would not be entitled to a general re-perusal; this is a question which sometimes arises in those exceptive cases where the purchaser has to pay the vendor's expenses.

Alterations
in draft
should be
communi-
cated.

The engrossment is made by and at the expense of the purchaser; the ordinary practice, as to the position of the indorsed receipt and attestation clauses, should be adhered to; as a departure therefrom may give rise to questions with future purchasers (*u*).

Engross-
ment

The engrossment is the property of the purchaser; when executed the vendor has a lien upon it for unpaid purchase-money (*w*), but his attorney has no lien on it for costs (*x*).

belongs to
purchaser.

Where the engrossment was executed by the vendors, but the purchase went off in consequence of other material parties refusing to execute, and the vendors made no claim to it as a deed, the purchaser was held entitled at Law to recover it from their attorney, they being allowed to cancel it (*y*); this decision, however, as observed by Sir *E. Sugden*, "depended upon the instrument having been imperfectly executed, and upon the sellers not interposing to claim any interest in it" (*z*): and where the

Executed
and then
the contract
rescinded.

(*t*) 1 V. & B. 15.

J. 493.

(*u*) *Kennedy v. Green*, 3 Myl. & K. 699.

(*y*) *Esdaile v. Oxenham*, 3 B. & C. 225.

(*w*) Sug. 694.

(*z*) Sug. 695.

(*x*) *Oxenham v. Esdaile*, 2 Y. &

Chap. XII. deed has been executed so as to vest the legal estate in the purchaser, there would seem to be a difficulty in holding that he could claim to retain it upon the contract going off, even although he were willing to execute a reconveyance.

CHAPTER XIII.

Chap. XIII.

AS TO MATTERS RELATING TO THE COMPLETION OF
THE PURCHASE.

1. *The execution of the conveyance:—by married women, &c.—conveyance of trust estates under the Trustee Act, 1850.*
2. *As to the discharge of incumbrances.*
3. *As to purchaser's liability to see to application of purchase money.*
4. *As to the amount payable in respect of purchase money—how increased or diminished.*
5. *To whom and how the purchase money should be paid.*
6. *As to purchaser's right to deeds, attested copies, &c.*
7. *As to matters necessary to insure the full effect of executed conveyance;—registration, inrolment, &c.*
8. *As to stamps.*
9. *As to costs.*

(1.) THE vendor must in person convey (*a*), or, as respects copyholds, surrender (*b*) the property; the purchaser need not rely upon a power of attorney: and any assurance of a married woman's interest in real estate, executed under a power of attorney, seems to be inoperative (*c*).

Vendor
must convey
in person.

Where, on the sale of freeholds, a married woman joins in respect of her estate or interest not settled to her separate appointment or use, her acknowledgment of the deed

Conveyance
of freeholds
by married
woman
must be ac-
knowledgeed

(*a*) 2 Ves. 681.

(*c*) *Graham v. Jackson*, 6 Q. B.

(*b*) *Mitchel v. Neale*, 2 Ves. 679; 811.

Noel v. Weston, 6 Mad. 50.

Chap. XIII.

under 3 & 4
Will. IV. c.
74.

Acknow-
ledgment by
whom to be
taken.

Special
Commis-
sioners ap-
pointed,
nunc pro
tunc.

Certificate
of acknow-
ledgment to
be made,
verified and
filed.

under the 3 & 4 Will. IV. c. 74, is an essential part of the conveyance (*d*); and the purchase money should not be paid until such acknowledgment be perfected.

The acknowledgment is to be made before one of the judges of the superior Courts at Westminster, or a Master in Chancery, or two of the perpetual Commissioners appointed under the Act (*e*), or—where by reason of residence beyond seas, or ill health, or any other sufficient cause, the married woman shall be prevented from so acknowledging the deed—before special commissioners to be appointed by the Court of Common Pleas (*f*). Where a commission had issued to persons supposed to be near a particular locality up the country in India, and, in consequence of their removal, the acknowledgment was taken before strangers, the Court, under the special circumstances, allowed the commission to be amended by inserting their names (*g*): when the Christian name of the woman was unknown, a commission issued with the name in blank; but the Court observed, that more than ordinary care must be taken to verify the party by affidavit (*h*).

The person or persons taking the acknowledgment must sign a memorandum and certificate (*i*), in the forms prescribed by the 84th section of the Act; the certificate, with an affidavit (*k*) verifying the same, is then to be filed in the Common Pleas; and thereupon the deed will, as respects the married woman, take effect from the time of acknowledgment (*l*); when the certificate and affidavit are

(*d*) *Billington v. Webb*, 1 De G. & S. 716; *Lassence v. Tierney*, 1 Mac. & G. 572.

(*e*) Sect. 79.

(*f*) Sect. 83.

(*g*) *In re Stubbs*, 5 Sc. N. R. 327.

(*h*) *In re Apperton or Atherton*, 1 C. B. 447; 3 Dow. & L. 26.

(*i*) A description of the woman in

the certificate, as “Mary the reputed wife of A. B., otherwise Mary S., spinster,” has been held to be sufficient; *Ex parte Francis*, 5 C. B. 498.

(*k*) Which may be on either paper or parchment: *Ex parte Carr*, 5 C. B. 496; see *In re Foster*, 7 C. B. 124.

(*l*) Sects. 85 and 86.

inconsistent with each other, the Court will not allow them to be filed (*m*) ; and therefore, of course, will not permit a certificate to be so amended as to make it vary from or alter the sense of the affidavit (*n*).

Chap. XIII.

The General Rules published by the Court of Common Pleas in Hilary Term, 1834, provide, that in case of an acknowledgment before Commissioners, one, at least, of such Commissioners shall be a person who is not interested in the transaction, or concerned therein as attorney, solicitor, or agent, or clerk to any attorney, solicitor, or agent so interested or concerned : and the Commissioners are to inquire of the married woman, separately from her husband and from the attorney or solicitor employed in the transaction, whether any provision is to be made for her in lieu of the interest which she gives up (*o*) ; and, if so, are to satisfy themselves before taking the acknowledgment that such provision has been made by some deed or writing produced to them, or, if not made, then they are to require its terms to be reduced into writing, and verify the same by their signatures ; and the affidavit (*p*) (which may be made by one of the Commissioners, although he be the solicitor employed in the transaction (*q*),) is to be in the form annexed to such General Rules.

General rules of Hilary Term, 1834.

Separate examination of married woman.

The Court will allow the Acknowledgment to be taken in consideration of a sum of money actually paid to the married woman, if the sum so paid be too small (*e. g.*, 40*l.*) to form the subject of a settlement (*r*) : and the

Acknowledgment in consideration of money paid to married women, allowed.

(*m*) *In re Dixon*, 4 C. B. 631.

(*n*) *In re Millard*, 5 C. B. 753 ;

Ex parte Witty, 9 Dow. P. C. 838 ; see, as to interlineations, &c., in the affidavit, *In re Worthington*, 5 C. B. 511 ; *In re Fagan*, *ibid.* 436.

(*o*) See, as to taking an Acknowledgment from a deaf and dumb

woman, *In re Harper*, 6 Man. & G. 732.

(*p*) The Affidavit must speak positively to the fact of her having attained majority : *In re Coverley*, 8 Scott, 147.

(*q*) *In re Scholefield*, 3 Scott, 657.

(*r*) *Ex parte Webber*, 5 C. B. 179.

Chap. XIII.

As to the Affidavit where acknowledgment is taken abroad.

Mode of assuring married woman's interest in copyholds.

usual inquiry as to a provision is unnecessary on a compulsory sale to a Public Company (*s*).

When an Acknowledgment is taken abroad, the Court will not dispense with an Affidavit of verification sworn and authenticated according to the local Law, unless it be distinctly shown that great inconvenience would result from a strict adherence to the ordinary rule (*t*) : upon this principle, the Court has received an Affidavit sworn before a British Consul, upon evidence either that he was, according to the *Lex loci*, competent to administer an oath (*u*), or that there was no local authority within reach who possessed such a power (*v*) : so, also, it has received, under similar circumstances, Affidavits sworn before the "Provisional British Consul at the Society Isles" (*w*), the "Minister of the British Chapel at Moscow" (*x*), and a "political agent up the country in India" (*y*) ; but has refused to receive an Affidavit sworn before the British Minister at Florence, it not appearing that there was no local authority competent to take the Affidavit (*z*).

Upon a sale of copyholds, a surrender to the use of the purchaser, by the copyholder's wife, with his consent, after she has been privately examined, will bar her right to freebench, if any exist by special custom ; although, at the date of the surrender, the purchaser has no legal estate in the premises (*a*). Upon the sale of her copyhold property, if she have the legal estate, the conveyance must be by

(*s*) *In re Foster*, 7 C. B. 120.

(*t*) *In re Crawford*, 4 C. B. 626 ; and see *In re Eady*, 6 Dow. P. C. 615 ; *In re Pearsall*, 9 Dow. P. C. 46 ; *Ex parte Shaw*, *ibid.* 839 ; *In re Schiff*, 1 Dow. & L. 911 ; *Ex parte Way*, *ibid.* 950 ; *In re Street*, 2 C. B. 364.

(*u*) *In re Barber*, 4 Dow. P. C. 640, does not seem to be an authority for the general power of a Con-

sul, see *Ex parte Hutchinson*, 5 C. B. 499.

(*v*) *Davy v. Maltwood*, 2 Man. & G. 424 ; *Ex parte Daly*, 9 Dow. P. C. 380.

(*w*) *In re Darling*, 2 C. B. 347.

(*x*) *In re Pickersgill*, 6 Man. & G. 250.

(*y*) *In re Stubbs*, 5 Scott, N.R. 327.

(*z*) *In re Dunsany*, 7 C. B. 119.

(*a*) See *Wood v. Lambirth*, 1 Ph. 8.

surrender: if her estate be merely equitable, a surrender by her and her husband, after she has been privately examined, is binding as if her estate were legal (*b*); or her equitable estate will pass by a mere deed acknowledged under the Act (*c*). Chap. XIII.

So, also, an acknowledged deed will pass a married woman's reversionary interest in the proceeds of sale of real estate subject to a trust for sale but remaining unsold (*d*); or in money subject to an absolute trust for investment in land (*e*).

Acknowledged deed will pass her reversionary interest in proceeds of sale of real estate, or in money subject to be invested in real estate.

We have seen that an assignment, merely by the husband, of her legal terms for years, is sufficient; but that, as respects her equitable chattels real, it is prudent to require that she shall join in and acknowledge the assignment (*f*): and when the husband purports to convey, for the continuance of the coverture, his wife's freeholds, a like precaution seems to be requisite if the legal estate be outstanding, or in reversion expectant on a term of years created for a limited purpose (*g*).

As to her Terms for years.

By the 91st section of the Act, it is provided, that if a husband shall, in consequence of his being a lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, or shall from any other cause, be incapable of executing a deed or making a surrender of lands held by copy of court roll, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife, either by mutual consent or by sentence of divorce, or in consequence of being transported beyond the seas, or from any other cause whatsoever, it shall be lawful for the Court of Common Pleas at Westminster, by an Order to be made in a summary way upon

Concurrence of Husband, when dispensed with.

(*b*) 3 & 4 Will. IV. c. 74, s. 90.

(*f*) *Supra*, p. 5.

(*c*) Sect. 77.

(*g*) *Hanson v. Keating*, 4 Ha. 1;

(*d*) See *May v. Roper*, 4 Sim. 360; 1 Jarm. on Wills, 537, n.

Newenham v. Pemberton, 1 De G. & S. 644.

(*e*) 3 & 4 Will. IV. c. 74, s. 77.

Chap. XIII.

the application of the wife, and upon such evidence as to the Court shall seem meet, to dispense with the concurrence of the husband in any case in which his concurrence is required by the Act or otherwise; and all deeds, &c. by the wife, pursuant to such order, are to be executed, &c. by her as if a *feme sole*; and when executed, &c. shall, but without prejudice to the husband's rights as then existing independently of the Act, be as good and valid as they would have been if he had concurred: but the provision is not to extend to cases in which the Lord Chancellor, or other the persons intrusted with the Great Seal, or the Court of Chancery, shall be Protector of a Settlement in lieu of the husband. This clause has been held to extend to copyholds, over-riding the 77th section (*h*). The order has been made in cases where the husband, having committed an act of bankruptcy, has absconded and gone abroad, and has not since been heard of (*i*); so, where, although not a lunatic (*j*), he was in a state of complete imbecility (*k*); so where he was living apart from his wife, and refused to concur in conveying property vested in her as a trustee (*l*); or in conveying her own property, unless part of the purchase-money were paid to him (*m*): but the Court has refused an order in cases of, what appeared to be, his mere temporary absence from the country; as where the wife's affidavit stated that he had gone to New Zealand, and, when last heard of,

(*h*) *Ex parte Shirley*, 5 Bing. N. C. 226.

(*i*) *Ex parte Gill*, 1 Bing. N. C. 168; *Ex parte Stone*, 9 Dow. P. C. 843; the affidavit must be made by the wife herself; *In re Bruce*, 3 Scott, N. R. 592; 9 Dow. P. C. 840; *In re Williams*, *ibid.* 72.

(*j*) As to what evidence of existing Lunacy is sufficient, see *In re Turner*, 3 C. B. 166.

(*k*) *In re Woodall*, 3 C. B. 639.

(*l*) *In re Mirfin*, 4 Man. & G. 655.

(*m*) *In re Woodcock*, 1 C. B. 437.

For form of order enabling wife to convey her own estate, see *Ex parte Duffill*, 6 Scott, N. R. 30; but the Court will not sanction any particular form of conveyance, but will only give a general authority to convey: *In re Woodall*, 3 C. B. 639.

was employed in a Government vessel, and that she believed that he never intended to return (*n*); so, when it stated, that the husband, a seaman, had gone abroad and that she had not heard of him for many years and believed him dead, no sufficient grounds for such belief being stated (*o*). Chap. XIII.

And the disposing power of a married woman under the above Act, is, by the 8 & 9 Vict. c. 106, extended to contingent and other similar interests, and to rights of entry; and she is also thereby enabled to disclaim, by deed, executed and acknowledged under the 3 & 4 Will. IV. c. 74, any estate or interest in tenements or hereditaments in England, of any tenure (*p*). Married woman may by acknowledged deed convey contingent interests, and may disclaim.

An assignment of leaseholds, or any other chattel interest in real estate, by one of several executors or administrators, is valid (*q*): so, also, is an assignment by an executor who dies before probate; but the will must eventually be proved; as the probate copy is the only evidence of the appointment of the executor (*r*): but an assignment by a person assuming to act as administrator, and who subsequently obtains letters of administration, is void (*s*). As to assignment of Terms for years by Executors or Administrators.

By the Lands Clauses Consolidation Act, if, upon the deposit in the Bank of the purchase money or compensation agreed or awarded to be paid in respect of lands purchased or taken by the promoters of the undertaking, the owners or statutory owners fail to convey the land upon request, the promoters are authorized to execute a deed-poll, which will have all the effect of a conveyance by the Power for promoters of Public undertakings in certain cases to convey to themselves upon the refusal or default of the owners.

(*n*) *Ex parte Gilmore*, 3 C. B. 967; and see *In re Smith*, 16 L. J., N. S., C. P. 168.

(*o*) *Ex parte Taylor*, 7 C. B. 1. Of course the order was applied for as a means of avoiding the necessity of proving the death as a matter of title, and it was eventually made, on

further evidence.

(*p*) See sections 6 and 7 of the Act.

(*q*) *Simpson v. Gutteridge*, 1 Madd. 609.

(*r*) *Brazier v. Hudson*, 8 Sim. 67.

(*s*) Wms. on Executors, 3rd ed. 312.

Chap. XIII. owners or statutory owners (*t*): similar powers are also conferred upon the promoters of the undertaking, in the several events of the owners (*u*) refusing to convey, or failing to make a title, or not being discoverable (*w*).

Trustee bound to convey at request of *cestui que trust*.

Where a trustee of an outstanding legal estate refuses in a plain case to convey at the request of a party entitled to a conveyance, he will, if a bill be filed against him, be fixed with costs (*x*); and where a party has accepted a trust, he cannot, it is conceived, justify his refusal to convey on the ground that no estate is in fact vested in him. A trustee, however, when required to convey the estate on the ground of the trusts having terminated, is entitled to clear and satisfactory evidence of such being the fact (*y*). And he cannot be required from time to time to divest himself of different parcels of the trust estate, or to convey by other words and descriptions than those by which the conveyance was made to himself (*z*), and the same is the rule in the case of a mortgagee (*z*).

But only by the description under which he himself took the estate.

Mortgagee not bound to convey before time fixed for redemption.

Assignee in Bankruptcy not consulted as to sale, held entitled to a reference as to its propriety.

And a mortgagee cannot be compelled to reconvey before the time fixed for redemption, although he be tendered his principal with interest up to that time (*a*).

Where a dormant assignee in bankruptcy had not been consulted as to the sale of part of the estate, and had reasonable cause to doubt whether it would be beneficial, it was held, that he could not be compelled to execute the conveyance, without a previous reference as to the propriety of the sale (*b*).

(*t*) See sect. 75.

(*u*) *Quere* whether this includes Statutory owners. See *Frend and Ware's Rail. Conv.* 83, n.

(*w*) See sects. 76, 77. See, on the construction of a clause in a private Act, similar to the 76th section, *Doe v. Manchester, Bury, and Rossendale Railway Company*, 9 Jur. 949.

(*x*) *Willis v. Iliscor*, 4 Myl. & Cr.

197; *Hampshire v. Bradley*, 2 Coll. 34.

(*y*) *Holford v. Phipps*, 3 Beav. 434.

(*z*) *Goodson v. Ellison*, 3 Russ. 594.

(*a*) *Brown v. Cole*, 14 Sim. 427.

(*b*) *Ex parte Underhill*, 3 Mon. & A. 660.

In many cases a conveyance of the legal estate, which could not otherwise have been procured without suit, might, prior to the 1st November, 1850, have been obtained under the provisions of the 1 Will. IV. c. 60, (commonly known as Sir E. Sugden's Act), the 4 & 5 Will. IV. c. 23, and the 1 & 2 Vict. c. 69. These Acts (*c*) have been repealed, and their principal provisions have been re-enacted, along with considerable additions, by the 13 & 14 Vict. c. 60, (cited as the Trustee Act, 1850). By this Act (*d*), the Lord Chancellor sitting in lunacy (as respects matters within that jurisdiction), the Court of Chancery, and the local Courts of Lancaster and Durham (as respects lands within the palatinate jurisdictions (*e*),) are respectively enabled in the several cases of;

Chap. XIII.

Conveyance of legal estates from trustees, &c. formerly procurable under 1 Will. IV. c. 60; repealed by "the Trustee Act, 1850."

Under which the Court may, in the several cases of

A lunatic, or person of unsound mind, or infant, being seised or possessed of any land upon any trust or by way of mortgage (*f*), or entitled to any contingent right in any lands upon any trust, or by way of mortgage (*g*);

a Lunatic or Infant being a trustee or mortgagee;

Or of any person, solely or jointly with any other person or persons, seised or possessed of any lands upon any trust, or entitled to a contingent right in any lands upon any trust, being out of the jurisdiction, or not to be found (*h*);

or of a trustee being out of jurisdiction or not to be found;

Or of its being uncertain which of several persons jointly seised or possessed of any lands upon any trust, was the survivor (*i*);

or of its being uncertain which of several trustees was the survivor;

Or, (where one or more person or persons shall have been seised or possessed of any lands upon any trust,) of

or of its being uncertain whether last trustee be living or dead;

(*c*) As to the effect of which, see Hill on Trustees, 275, *et seq.*; and Coote on Mortgages, 3rd ed. 359, *et seq.*; and Sug. 225.

"trustee," "lunatic," "person of unsound mind," "devisee," and "mortgagee."

(*e*) Sect. 21.

(*f*) Sects. 3 and 7.

(*g*) Sects. 4 and 8.

(*h*) Sects. 9 to 12.

(*i*) Sect. 13.

(*d*) See sect. 1 for the extended meaning given throughout the Act to the expressions "lands," "seised," "possessed," "contingent right," "convey," "conveyance," "trust,"

Chap. XIII. its not being known whether the trustee last known to have been seised or possessed be living or dead (*k*) ;

or of trustee
dying with-
out an heir ;

Or of any person seised of any lands upon any trust having died intestate as to such lands without an heir, or having died and its not being known who is his heir or devisee (*l*) ;

or of con-
tingent
right being
claimable
by unborn
trustee ;

Or of lands being subject to a contingent right in an unborn person or class of persons, who, upon coming into existence would, in respect thereof, become seised or possessed of such lands upon any trust (*m*) ;

or of trust-
tee refusing
to convey,
&c. ;

Or of a person jointly or solely seised or possessed of any lands upon any trust, or entitled to a contingent right in any lands upon any trust, being required, by a person entitled to a conveyance, assignment, or release of the same respectively, or his agent, to convey, release, or assign the same, but declining in writing so to do, or refusing or neglecting so to do, for the space of twenty-eight days next after a proper instrument of assurance shall have been tendered to him by any person entitled to require the same, or his agent (*n*) ; to make an order vesting such lands in such person or persons in such manner and for such estate, or releasing the lands subject to such contingent right therefrom, or disposing of the same, as the Court shall direct ; and the order is in itself to operate as an assurance.

make a
vesting or
releasing
order, which
is to operate
as an as-
surance.

And may,
under cer-
tain circum-
stances,
make a vest-
ing order in
respect of
mortgaged
lands in
cases of

And where any mortgagee shall have died without having entered into the possession, or into the receipt of the rents and profits (*o*) of the mortgaged lands, and the money due in respect of the mortgage shall have been paid to a person entitled to receive the same, or such last-mentioned person shall consent to an order for the re-conveyance of

(*k*) Sect. 14.

(*l*) Sect. 15.

(*m*) Sect. 16.

(*n*) Sects. 17 and 18.

(*o*) Sect. 19. These words will, it is conceived, materially affect the utility of the clause.

such lands, the Court may make an order vesting such lands in such person or persons, in such manner, and for such estate as the Court shall direct, in case— Chap. XIII.

An heir or devisee of such mortgagee shall be out of the jurisdiction, or cannot be found ;

Or an heir or devisee of such mortgagee shall, upon a demand by a person entitled to require a conveyance of such lands, or his agent, have stated in writing that he will not convey the same, or shall not convey the same, for the space of twenty-eight days next after a proper deed for conveying such lands shall have been tendered to him by a person entitled as aforesaid, or his agent ;

Or it shall be uncertain which of several devisees of such mortgagee was the survivor ;

Or it shall be uncertain as to the survivor of several devisees of such mortgagee, or as to the heir of such mortgagee, whether he be living or dead ;

Or such mortgagee shall have died intestate as to such lands, and without an heir, or shall have died, and it shall not be known who is his heir or devisee ;

And the order is itself to have the effect of an assurance.

And the Court may, in every case, instead of making a vesting or releasing order, appoint a person to make a conveyance, assignment, release, or disposition of the lands or contingent interest ; which, when duly made, is to have the effect of a vesting or releasing order (p).

As respects copyhold or customary lands, a vesting order, if made with the consent of the lord or lady of the manor, is sufficient to pass the lands without surrender or admittance ; and where the Court appoints a person to convey such lands, such person may do all acts and execute all instruments for the purpose of com-

heir or
devisee
being out of
jurisdiction
or not to be
found ;
or refusing
to convey ;

or of sur-
vivor of
several de-
visees being
unknown ;
or of its
being un-
certain
whether
heir or sur-
viving de-
visee be
alive ;
or of no heir
or devisee
existing, or
being
known.

Court may
appoint a
person to
convey, &c.,
instead of
making
vesting
order.

As to copy-
holds.

Chap. XIII. pleting the assurance (*q*), and which are to be effective accordingly.

Court may declare what parties are trustees of lands comprised in any suit for specific performance, &c.;

And where any decree shall be made by any Court of Equity for the specific performance of a contract concerning any lands, or for the partition or exchange of any lands, or generally when any decree shall be made for the conveyance or assignment of any lands, either in cases arising out of the doctrine of election or otherwise, such Court may declare that any of the parties to the suit are trustees of such lands, or any part thereof, within the meaning of the Act; or may declare, concerning the interests of unborn persons who might claim under any party to such suit, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which such decree is made, that such interests of unborn persons are the interests of persons who upon coming into existence would be trustees within the meaning of the Act; and thereupon the estates, rights, and interests of such persons, born or unborn, may be dealt with by order under the Act (*r*).

parties seeking orders may go at once before the Master, or proceed by petition.

And the Act enables parties either to go before the Master in the first instance, and upon obtaining his certificate of the material facts, and of his opinion that they are entitled to a specified order, to apply by motion for such order (*s*); or to proceed by petition in the same way as has been customary under the 1 Will. IV. c. 60 (*t*).

Certain allegations made evidence of facts alleged, if

And the Act provides (*u*), that whenever an order shall be made for the purpose of conveying or assigning any lands, or of releasing or disposing of any contingent right,

(*q*) Sect. 28.

(*t*) *Ibid.* p. 51, n. (*o*); see ss. 40,

(*r*) Sect. 30.

41, and 42 of Act.

(*s*) Sects. 38 and 39: even in the case of Lunacy the reference is to a Master in *Chancery*. Headlam's Trustee Act, 1850, s. 38.

(*u*) Sect. 44: these provisions as to evidence do not seem to apply to orders by the Palatinate Courts.

and shall be founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee or the heir or devisee of a mortgagee is out of the jurisdiction, or cannot be found, or that it is uncertain which of several trustees or which of several devisees of a mortgagee was the survivor, or whether the last trustee or the heir or last surviving devisee of a mortgagee be living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir, or has died and it is not known who is his heir or devisee, then in any of such cases the fact of an order being made upon such an allegation shall be conclusive evidence of the matter so alleged, in any Court of Law or Equity upon any question as to the legal validity of the order; but this is not to prevent the Court from directing a re-conveyance, &c., if the order is shown to have been improperly obtained.

Chap. XIII.
order made
thereon.

And a subsequent section (*w*) re-enacts the 3rd and 5th sections of 4 & 5 Will. IV. c. 23, preventing the escheat of property held upon trust or mortgage.

No escheat
of trust and
mortgage
rates.

The words *trust* and *trustee*, as defined in the interpretation clause of the Act, would include the case of a vendor who had entered into a valid and subsisting contract for sale, or his representatives; but the 30th section (*x*) seems to show that it is not intended that a vendor's interests shall be dealt with under the Act unless there has been a decree for specific performance, or an express declaration of trust.

Interests of
vendor, how
far capable
of being
dealt with
under act.

(2.) *As to the discharge of incumbrances.*

Until the conveyance is executed by all necessary parties, the vendor remains liable in respect of all defects in title: he must, for instance, refund the purchase money, if

Vendor
liable for in-
cumbrances
and defects
of title until
conveyance
executed;

(*w*) Sect. 46.

(*x*) Cited *supra*, p. 280.

Chap. XIII. the purchaser having paid it, even although having taken possession, be evicted by an adverse claimant (*y*) ; so, if incumbrances be discovered, he must discharge them, or the purchaser himself may pay them off out of the unpaid purchase money (if any) (*z*) : but the latter cannot retain any part of it as an indemnity against a contingent charge against which he has agreed to accept the vendor's covenant (*a*).

and (in case of a married woman) acknowledged.

It is conceived that, for the purpose of the above rules, mere execution of the conveyance by a married woman is insufficient, for she has still a *locus pœnitentiæ* ; and that, until acknowledgment by her, the vendor's liability to discharge incumbrances, or make good defects in title, continues to subsist ; but this liability, it is conceived, does not subsist between acknowledgment and the filing of the certificate.

Retention of incumbrances out of unpaid purchase-money after conveyance executed.

And, in some cases, a purchaser may, even after the conveyance is executed, retain, out of unpaid purchase money, the amount of incumbrances which then come to his knowledge (*b*).

Incumbrances must be paid off or released.

All incumbrances which would affect the property in the hands of the purchaser, must, of course, be released, or paid off by the vendor, or out of the purchase money ; and a person, to whom the vendor has, for valuable consideration and without notice of any particular incumbrance, assigned the unpaid purchase money, takes subject to the purchaser's right so to apply the same (*c*) ; we have seen (*d*) that judgments entered up against the vendor subsequently to the contract are a lien upon the amount remaining unpaid.

(*y*) *Cripps v. Reade*, 6 D. & E. 606 ; *Johnson v. Johnson*, 3 Bos. & P. 162 ; Sug. 680.

(*z*) Sug. 679.

(*a*) *Vane v. Lord Barnard* (a case

of a marriage settlement), Gilb. Eq. R. 6.

(*b*) *Vide infra*, Chapter XIV.

(*c*) *Lacey v. Ingle*, 2 Phil. 413.

(*d*) *Supra*, p. 119 and 233.

Where a puisne incumbrancer contracted for the purchase of the estate free from incumbrances, and took possession, but did not pay his purchase money, and afterwards bought in a prior incumbrance, it was held that he must, as in favour of the vendor's representatives, be considered to have applied the purchase money, on the day on which he took possession, towards satisfaction of the incumbrances, *according to their priorities* (e).

Chap. XIII.
Implied application of purchase-money by purchaser of equity of redemption in possession.

The Lands Clauses Consolidation Act, 1845, contains clauses which enable promoters of undertakings to dispense with the concurrence of incumbrancers who refuse to receive their money, or to release, or who cannot make out a satisfactory title (f); and also provisions applicable to cases where only a portion of the lands subject to the incumbrance is required for the purposes of the undertaking.

Discharge of incumbrances under the L. C. C. Act, 1845.

(3.) *As to purchaser's liability to see to application of trust purchase money.*

The law as to the liability of a purchaser from trustees to see to the application of his purchase money cannot be considered as settled; the following remarks are made with hesitation, but under the belief that the general principles here attempted to be laid down, will, upon examination, be found to consist with the modern authorities (g).

As to liability of purchaser from trustees to see to application of purchase-money.

It is submitted that, in every case, the question is simply one of intention on the part of the author of the trust; and that the trustees' power to give receipts depends solely upon the degree of confidence which he has, either expressly or impliedly, reposed in them.

Tested by intention of author of the trust, *semble*.

This intention may, as before observed, be either expressed or implied; expressed, as where the will or trust-

As either expressed or implied.

(e) *Greenwood v. Taylor*, 14 Sim. 505.

(f) See sect. 108, *et seq.*; and 115 *et seq.*

(g) See an article in the *Jurist*, vol. 11, part 2, p. 126, advocating conclusions different from those which are here contended for.

Chap. XIII.

deed contains a clause which in terms empowers the trustees to give valid discharges for the purchase money; implied, as where the trusts are of such a nature as that a contrary intention cannot reasonably be attributed to the author of the trust.

Matters posterior to the creation of the trust neither take away—

And if this intention be expressed, or can be implied, the trustees, upon a sale apparently in pursuance of the trust, have, under all circumstances, a power to give receipts. Of course, it may be shown that the sale is in fact a breach of trust; but then the objection is to the sale itself, and is not a question of application of purchase money.

nor confer a power to give good discharges.

And, on the other hand, where this intention is not expressed and cannot be implied, the mere fact that the parties beneficially interested at the time of sale are infants, or unascertained, or any other similar circumstance, will not enable the trustees to give a valid discharge; but the purchaser must see to the application of the money.

What circumstances attending the trust confer such a power by implication—trusts being for payment of debts;

or in favour of unascertained or incompetent cestui que trust;

For instance,—(to consider first the question of implied intention, and what sufficiently indicates it,)—where the trust is for payment of debts generally, or for payment of debts generally and of legacies or annuities, the trustees take by implication a power to give discharges; for no purchaser, upon a sale during the existence of debts, could be expected to take an account of them (*h*): so, where the trust is for payment to a person or persons who may be unascertained, or under age, or subject to any other incapacity or inability to receive the purchase money, and a sale during the existence of such uncertainty, minority, incapacity, or inability, seems contemplated by the author of the trust; for, if the trustees cannot receive the money, there would, upon a sale under such circumstances, be no

(*h*) *Johnson v. Kennett*, 3 Myl. & 420; *Forbes v. Peacock*, 1 Ph. 717; *K. 624*; *Eland v. Eland*, 4 M. & C. *Page v. Adam*, 4 Beav. 269, 283.

hand to receive it (*i*): so, where the money "is to be applied upon trusts which require time and discretion" (*k*), for no purchaser could be expected to involve himself therein: so, where the money is to be invested, it is sufficient if the purchaser see that this is done and that a declaration of trust is executed (*l*).

Chap. XIII.
or requiring
time and
discretion;
or where
money is to
be re-in-
vested.

So, executors can give good discharges for the purchase-money of chattels real, although specifically bequeathed (*m*); for an appointment of an executor, is, in effect, a bequest to him of the personalty in trust to sell for the payment of general debts: and the same rule seems to apply to cases where executors take, either expressly or by implication, a power to sell freeholds or copyholds, and the proceeds of sale are to be applied by them in a mixed fund with the residuary personal estate (*n*).

So, exe-
cutors can
give good
discharges.

But, on the other hand, where the trusts are for payment of the purchase-money, or some definite part of it, to some ascertained person or persons, whose incapacity or inability to receive the same at the time of sale does not appear to be contemplated by the author of the trust, there is no sufficient indication of an intention that the trustees shall give good discharges; and the purchaser is therefore bound to see to the application of the whole or part (as the case may be) of the purchase-money.

In what
cases no
such power
is implied.

For instance, where the trust (as respects the whole or some definite portion of the purchase-money) is to pay scheduled or specified debts (*o*), or legacies only (*p*), or to divide it between two or more adults (*q*), in all these and similar cases, as nothing seems to be contemplated which

Where trust
is for definite
payments
to ascer-
tained and
competent
parties.

(*i*) *Sowarsby v. Lacy*, 4 Madd. 142; *Lavender v. Stanton*, 6 Madd. 46; *Balfour v. Welland*, 16 Ves. 151; *Breedon v. Breedon*, 1 Russ. & M. 413.

(*k*) Sug. 836; citing *Doran v. Wiltshire*, 3 Sw. 699.

(*l*) Sug. 838.

(*m*) See Wms. on Executors, 743.

(*n*) *Tylden v. Hyde*, 2 Sim. & St. 238; *Jones v. Price*, 11 Sim. 557.

(*o*) Sug. 834.

(*p*) 3 Myl. & K. 630.

(*q*) 12 Sim. 546.

Chap. XIII. would impose upon a purchaser any greater hardship than that of paying the whole, or a definite part (as the case may be), of his purchase-money, to A. the beneficial, rather than to B. the legal owner of the property, no intention can be implied of relieving the purchaser from his *prima facie* obligation of seeing that his money reaches the hand substantially entitled to it.

Subsequent events immaterial;

And it appears to be consistent with authority to say, that the power, or want of power, (as the case may be,) to give valid discharges, being dependent upon intention as evidenced in the instrument declaring the trust, is unaffected by any subsequent matter or event.

in cases where power to give receipts is expressed or implied;

This doctrine is, (it is believed,) generally admitted in cases where the intention is evidenced by an express power to give receipts; and, (it is submitted,) the result cannot be affected by the circumstance of the intention being evidenced by one rather than another set of expressions.

modern authorities.

Nor are authorities wanting in support of this view; for instance, where the trusts were for payment of debts, and for other purposes also requiring a sale, the non-existence of debts at the time of sale, although disclosed to the purchaser, has been held immaterial (*r*); so, where the trust was to sell and pay the debts of such creditors as should execute the deed within a specified period, it was held, that, upon a sale after the expiration of that period, and although the creditors were then ascertained, the receipt of the trustees alone was a good discharge: Sir *W. Grant* observed, "according to the frame of the deed the purchasers were, or were not, liable to see to the application of the money; and their liability could not depend upon any subsequent event" (*s*).

(*r*) *Page v. Adam*, 4 Beav. 269; see Rep. note, 722.
Johnson v. Kennett, 3 Myl. & K. 624; (*s*) *Balfour v. Welland*, 16 Ves.
Eland v. Eland, 4 Myl. & Cr. 420; 151, 156.
Forbes v. Peacock, 1 Ph. 717; and

This last decision, it is conceived, goes the full length of the rule contended for ; in *Page v. Adam (t)*, *Johnson v. Kennet (u)*, and *Eland v. Eland (w)*, the rule was but partially recognised, inasmuch as (they being cases upon wills) it was only decided that the existence of debts at the death of the testator was sufficient ; nor did the judgment even in *Forbes v. Peacock (x)* go any further ; in fact, in all these cases, it was sufficient, for the purpose of deciding the question before the Court, to hold that the existence of debts at the death would sustain the power ; it appears, however, from the reporter's note to the last case, that Lord *Lyndhurst* recognises what is here contended for as the true principle ; viz. that the question is one of construction or intention ; and it is, of course, evident that in considering a will upon a question of this nature, it must be held to speak from the date of its execution.

So, if the trust were for immediate sale, and to divide the proceeds among infants, and a sale were not to take place until some, or even all, of the infants attained majority, it is submitted, that the power of the trustees to give receipts would not be affected : the attainment of majority by the infants would be precisely the same, in principle, as the execution of the deed by the creditors in *Balfour v. Welland (y)* ; until, however, the law is more settled, it would, in such a case, be prudent to obtain, if possible, the concurrence of the adult *cestui que trust*.

And, on the other hand, if the intention to confide such a power to the trustees be not evidenced by the instrument creating the trust, subsequent events will not confer it on them ; if, for instance, the trust be to sell and divide the proceeds between A. and B., and they so deal with their interests as to vest the beneficial estate in infants, or to

Chap. XIII.
Remarks on
Balfour v.
Welland.

Attainment
of majority
by infant
cestui que
trust, im-
material,
semble.

Nor can sub-
sequent
events con-
fer such a
power.

(t) 4 Beav. 269.

(x) 1 Ph. 717.

(u) 3 Myl. & K. 624.

(y) 16 Ves. 151.

(w) 4 Myl. & Cr. 420.

Chap. XIII.

make it the subject of contingent rights, so that a valid discharge by themselves or parties claiming under them becomes impracticable, this, it is conceived, would clearly not enlarge the powers of the trustees.

Distinction between the above cases and those in which, all the purposes of the trust being satisfied, the sale is a breach of trust.

But cases where, as in *Forbes v. Peacock* (z), the trustees have power to sell for several purposes, and notice to the purchaser of the non-existence of that particular purpose, the contemplated existence of which alone indicated an intention to confer a power to give receipts, is held to be immaterial, must be carefully distinguished from cases where a purchaser has notice that the *sole purpose* of the trust is satisfied : in the one case the only question is, whether the trustees can give a good discharge for the money ; and it has been held, and, (it is submitted,) properly held, that the confidence of the author of the trust is to be considered, not as varying, or temporary, but uniform, and co-extensive with the duration of the trust ; but, in the other case, *the trust for sale no longer exists* : so that if, in *Forbes v. Peacock*, the payment of debts had been the *only* object for which a sale was authorized, the purchaser, having implied notice that the debts were paid, would have also had notice that the sale itself was a breach of trust (a). So if, in dealing with an executor, the purchaser know that all the purposes, for the performance of which the Law empowers him to sell, have been already answered (b), or that he is selling for his own private benefit, the sale will be impeachable in Equity (c) : so, if a trustee sell to pay his own debts, and the purchaser be aware that such is the case (d) : but the mere fact of a beneficial devisee and

Improper sale by Executor to purchaser with notice confers no title.

(z) 1 Ph. 717.

(a) 1 Ph. 721 ; *Watkins v. Cheek*, 2 Sim. & St. 199 ; 4 Myl. & Cr. 427. The distinction here suggested does not appear to be recognised in the comments of a learned writer upon *Forbes v. Peacock*, in 11 Jurist,

part 2, p. 126.

(b) *Ewer v. Corbet*, 2 P. Wms. 148.

(c) Sug. 854 ; Wms. on Exors. 745 *et seq.*, and cases there cited : *Chambers v. Howell*, 12 Jur. 905.

(d) See *Eland v. Eland*, 4 Myl. &

executor, who has an estate subject to a charge of debts, selling it as his own, is no evidence of an intended breach of trust; for he is in truth the owner, subject to the charge, and it is his duty to satisfy the debts, which the sale may be the very means of enabling him to do (*e*).

Somewhat similar in principle is the distinction between cases where the trustee is to sell, and apply the proceeds in making good a deficiency in the personal estate to answer debts and legacies, and those in which he is only authorized to sell in the event of the personal estate so proving deficient; in neither case is there any difficulty as to payment of the purchase-money to the trustee, for no purchaser can be expected to involve himself in the administration of the estate; and even in the second of the two cases, if there be a mere trust for sale, and a good title can, independently of its exercise, be made to the legal estate, a purchaser will, it appears, be protected from the necessity of ascertaining the existence of a deficiency, although the trust instrument do not (as it should do) contain a declaration to that effect (*f*); but if there be a *mere power* of sale, the title to the legal estate will depend upon the occurrence of the specified event (*g*); and the trustees' receipt clause will be ineffective, unless it be so worded as in terms to enlarge the power (*h*).

Distinction between the above, and cases in which the object of the sale is to provide for deficiency in personal estate.

And where a testator devised estates A. and B., upon trust, if any debts remained unpaid, to sell first A., and then (if necessary) B., it was held that while estate A. remained unsold a good title could not be made to B.,

Cr. 427; and see *Braithwaite v. Britain*, 1 Keen, 206.

(*e*) *Eland v. Eland*, 4 Myl. & Cr. 428; and see *Higgins v. Shaw*, 2 Dru. & War. 356.

(*f*) Sug. 847.

(*g*) See *Dike v. Ricks*, Cro. Car.

335; *Culpepper v. Aston or Austin*, 2 Ch. Ca. 115, 221; Sug. 847.

(*h*) See Sug. 848. See a case of *Lord Rendlesham v. Meux*, 14 Sim. 249; where the opinion of the trustees was in terms made the test of the necessity for a sale.

Chap. XIII. without clear evidence being adduced that the proceeds of A. would be insufficient for the purposes of the trust (*i*).

On death of Vendor purchase-money is payable to his Executor and not to his Devisee in trust.

Where a testator himself contracted to sell the estate, the purchase-money must be paid to his executor, and the ordinary receipt clause in the Will does not enable his trustees to give a discharge for it, although the estate be devised to them in trust to complete the contract (*k*).

Surviving Trustees when able to sell and receive purchase-money.

It has recently been held, that where the instrument creating the trust *directs* that any vacancy in the trust shall be filled up within a specified period, which direction is not complied with, the surviving trustees can nevertheless sell and give a good discharge for the purchase-money under the usual receipt clause (*l*): but this doctrine should perhaps be cautiously acted on. It has also been held, that payment of money to three persons, nominally trustees, but only one of whom was competent to receive it, and a joint and several receipt given by the three, sufficiently discharged the purchaser (*m*); this also, it is conceived, is a doctrine open to observation; it is clear that the effect of such a mode of payment might often be to bring the money under the sole eventual control of persons who had no right whatever to deal with it.

Payment to trustees, some of whom are not duly appointed, whether valid.

In the case of several trustees, all who have not disclaimed must join in the receipt (*n*).

All Trustees must join in receipt.
7 & 8 Vict. c. 76.

And we may here refer to the repealed (*o*) Act of 7 & 8 Vict. c. 76; under which, from the 1st January to the 30th September, 1845, inclusive, the *bond fide* payment to and receipt of any person to whom any money was payable upon any express or implied trust or for any limited purpose, were an effectual discharge to the person paying the same.

(*i*) *Pierce v. Scott*, 1 Y. & C. Ex. 257.

(*k*) *Eaton v. Sanater*, 5 Sim. 517.

(*l*) *Warburton v. Sandys*, 14 Sim. 622.

(*m*) *Miller v. Priddon*, 18 L. J., N. S., Ch. 226, V. C. E.

(*n*) See Sug. 849, and cases cited.

(*o*) See 8 & 9 Vict. c. 106, s. 1.

A power for trustees to lend the trust-money upon mortgage appears to carry with it a power to give sufficient discharges to the borrowers of the money (*p*).

As respects moneys charged upon the estate by the author of the trust, there is a difference between charges the satisfaction of which by means of a sale appears to be contemplated, and those for which the estate seems intended to be a continuing security (*q*).

If, for instance, a legacy be charged upon the estate and made payable at a future period, (as where it is given to an infant and made payable, at twenty-one,) and there be nothing to show that the author of the trust intended the property to be sold before the arrival of the time for payment and discharge of the legacy, no sale can in the interval be safely effected, except subject to the legacy (*r*); the same remarks apply to a life annuity charged upon the estate (*s*), which in fact stands on precisely the same reasoning, for a life annuity is merely a series of contingent legacies, payable at stated intervals and without interest: in all these cases the apparent intention of the charge is, that the estate shall remain a security for the money: in the case of portions for children it seems doubtful whether the estate can, except under special powers in the settlement, be discharged from any sums which have not become absolutely vested (*t*).

If, on the other hand, the moneys charged be made payable at the time appointed for sale, the charge seems to be merely equivalent to a trust for payment out of the proceeds of sale; in fact, as respects debts, a charge of them upon the estate is held to amount to a trust for

Chap. XIII.

Power to lend on Mortgage implies power to give receipts.

As to application of purchase-money in payment of charges, distinction between the cases.

Between those where estate is intended to be a continuing security for legacy;

or annuity;

and those where an immediate sale seems to be contemplated.

Charge of debts equivalent

(*p*) *Wood v. Harman*, 5 Madd. 368; and see Sug. 848.

(*q*) See, on a similar point, *Mills v. Osborne*, 7 Sim. 30.

(*r*) *Dickenson v. Dickenson*, 3 Bro. C. C. 19.

(*s*) *Elliot v. Merryman*, Barnard. Ch. R. 82.

(*t*) *Sheppard v. Wilson*, 4 Ha. 392; but see, *contra*, *Gillibrand v. Goold*,

5 Sim. 149; and *Leech v. Leech*, 2 Dru. & W. 568.

Chap. XIII.
to trust for
sale to pay.

But Statutes
making real
estate assets
for payment
do not
amount to a
charge of
debts.

Receipt
under usual
powers of
attorney on
mortgage of
a fund
charged on
land, whe-
ther a good
discharge in
equity.

sale (*v*) : so, as we have already seen (*w*), when the charge is subject to a prior trust for payment of debts or other general purposes, a purchaser is unaffected thereby (*x*).

The power possessed by creditors upon taking proper proceedings for that purpose, of obtaining payment of their debts out of the descended or devised real estate in the hands of the heir or devisee (*y*), may be defeated by a prior alienation for valuable consideration ; and in the hands of the alienee the land is discharged, although the heir or devisee remains personally liable to the extent of the value of land alienated (*z*) : therefore, since the land itself is free, the existence of debts does not relieve a purchaser from the devisee from the necessity of seeing to the payment of legacies, &c. (*a*) : while, on the other hand, a purchaser, either from the heir or devisee, is not bound to see to the payment of either specialty or simple-contract debts (*b*).

It seems doubtful, when a sum charged upon an estate is assigned by way of mortgage, with the usual power of attorney to receive and give discharges, whether, upon the estate itself being sold, and the sum being paid off out of the proceeds of sale, the assignee can, as against incumbrancers on the equity of redemption of the sum, give a good discharge for the same in Equity under the power of attorney ; especially if the deed contain a power to sell the security, and the usual clause expressly making his receipts a good discharge in Equity, in respect of the proceeds of any sale under the power (*c*).

(*v*) *Shaw v. Borrer*, 1 Keen, 559 ; 193 ; *Spackman v. Timbrell*, 8 Sim. 253 ; see *Pimm v. Insall*, 1 Mac. & G. 449.
(*w*) *Ball v. Harris*, 4 Myl. & Cr. 264 ;
(*x*) *Gosling v. Carter*, 1 Coll. 644.

(*w*) *Supra*, p. 284.

(*x*) *Page v. Adam*, 4 Beav. 269.

(*y*) 3 & 4 W. & M. c. 14 ; 47
Geo. III. c. 74, sess. 2 ; 3 & 4 Will.
IV. c. 104.

(*z*) *Richardson v. Horton*, 7 Beav.

(*a*) *Horn v. Horn*, 2 Sim. & St. 448 ; *Ball v. Harris*, 4 Myl. & Cr. 264, 268.

(*b*) Sug. 834.

(*c*) *Brasier v. Hudson*, 9 Sim. 1.

(4.) *As to the amount payable in respect of purchase-money ;—how increased or diminished.*

The amount to be paid in respect of the purchase-money may in the several ways hereinafter noticed be increased or diminished.

Increase or diminution of purchase-money.

The most ordinary mode of increase is by the accrual of interest ; as respects which, it will be convenient to consider, first those cases where there is no special agreement as to interest ; premising that, in such cases, interest, when payable, is payable at Law after such rate, not exceeding *5l. per cent.*, as may be allowed by the Jury (*d*) ; and in Equity (as a general rule) after the rate of *4l. per cent. (e)* *per annum*.

Increased by interest ; —rate of, if no agreement.

If, then, a time be fixed for completion of the contract, and there be delay attributable to the purchaser, he must from that time pay interest upon his purchase-money, although it has been lying idle and appropriated to the purchase (*f*), and although he has not had possession of the estate, which (as in the case of a house bought for a residence) has therefore been unproductive ; but any actual profits arising from it he will be entitled to (*g*).

Payable from time fixed for completion if delay rests with purchaser.

If, on the other hand, (a time being fixed for completion,) there be delay attributable to the vendor, the purchaser, if he has or might prudently have been in actual possession or in receipt of the rents and profits of the estate, must pay interest, unless and until his money has been appropriated to the purchase and lying idle, and notice of such being the case has been given to the vendor (*h*) ; but it appears that, (if out of possession,) he will not be charged with interest until such time as he might prudently have

From what time payable if delay rests with vendor.

(*d*) 3 & 4 Will. IV. c. 42, s. 28.

(*g*) *Supra*, p. 116.

(*e*) Sug. 816.

(*h*) *Powell v. Martyn*, 8 Ves. 146 ;

(*f*) Sug. 793.

Sug. 794.

Chap. XIII.

taken possession: *i. e.*, until a good title was shown (*i*): and although he may, if he please, in the interim, pay interest and take the rents and profits from the time fixed for completion, (making the vendor account, not only for what he actually has, but for what he might, without wilful default, have received), (*k*) he is not bound to do so where the interest exceeds the rents and profits (*l*).

Whether, until title is shown, purchaser may appropriate his money and claim exemption from interest.

And, on the other hand, it has been held that a purchaser, if out of possession, is not justified in laying aside his purchase-money, and rendering it wholly or in part unproductive, until the time when a good title is shown by the vendor; and that, if he do so, it will be at his own risk and loss (*m*): this doctrine however seems open to observation (*n*).

Interest payable by purchaser in possession notwithstanding ambiguity in contract.

And the cases seem to show, that when a purchaser is in actual possession or receipt of the rents and profits, he must pay interest upon his purchase-money (unless lying idle with notice of the fact to the vendor) from the time fixed for completion, even although the vendor delay to show a good title, and the contract do not in terms make the purchase-money payable until a good title is shown; for instance, where parties already in possession agreed to purchase land, the purchase-money to be paid on the 25th of March next "on a good and valid title being made and executed," and a title was not made until many years afterward, but they continued in possession, and did not appropriate the purchase-money, they were held liable to pay interest from the above date (*o*).

(*i*) *Forteblow v. Shirleŷ*, 2 Sw. 223, cited; *Binks v. Lord Rokeby*, 2 Sw. 222; *Jones v. Mudd*, 4 Russ. 118; *Monk v. Huskisson*, 4 Russ. 121.

(*k*) *Acland v. Gaisford*, 2 Madd. 28; *Wilson v. Clapham*, 1 Jac. & W. 36.

(*l*) *Esdaile v. Stephenson*, 1 Sim. & St. 123; *Jones v. Mudd*, 4 Russ. 118, 123.

(*m*) *De Visme v. De Visme*, 13 Jur. 1037; 1 Mac. & G. 336, stated *infra*.

(*n*) *Vide infra*, 302.

(*o*) *Att.-Gen. v. Christ Church*, 13

If no time be fixed for completion, the purchaser pays interest upon his purchase-money, (unless lying idle with notice of the fact to the vendor,) from, (it is conceived,) the date of the contract, if the purchaser be then in possession, &c. (*p*) ; or, if he be not then in possession, from the time of his taking possession (*q*) ; or from the time at which he might prudently have taken possession (*r*) ; *i. e.*, the time when a good title was shewn.

And a purchaser taking possession subsequently to the contract, cannot, by giving up possession, escape his liability even to subsequent interest (*s*).

Upon the purchase of a reversion, the mere wasting of the particular estate by lapse of time appears to be, (for the purpose of the above rules,) equivalent to possession by the purchaser (*t*).

Interest upon the purchase-money of timber taken at a valuation is payable only from the date of the valuation (*u*) ; this, however, it is conceived, can only apply to timber which had not attained maturity at the date of the contract ; the reason for the rule being, that the augmented value of the timber by growth is included in the valuation, and is an equivalent to interest ; upon which Sir *E. Sugden* remarks, "but this, which was a good reason during the war, will not, in all times, justify the withholding of inter-

Chap. XIII.

If no time fixed for completion interest is payable from possession taken or title shewn.

Payment cannot be evaded by giving up possession.

Wasting of particular estate on sale of reversion equivalent to possession.

Interest upon valuation of timber from what date payable.

Growing timber.

Sim. 214 ; *Fludyer v. Cocker*, 12 Ves. 25.

(*p*) *Ex parte Manning*, 2 P. Wms. 410.

(*q*) *Fludyer v. Cocker*, and *Att.-Gen. v. Christ Church*, *ubi supra*.

(*r*) 2 Sw. 226 ; and see *Portman v. Mill*, 3 Jur. 356.

(*s*) See last note.

(*t*) *Ex parte Manning*, *ubi supra* ; *Owen v. Davies*, 1 Ves. 82 ; *Davy v. Barber*, 2 Atk. 489, 490 ; *Trefusis v. Lord Clinton*, 2 Sim. 359 ; *Sug* 793—805 ; and see *Champernowne v.*

Brooke, 3 Cl. & Fin. 4 ; and *Brooke v. Champernowne*, 4 Cl. & Fin. 589 ; where the vendors' *prima facie* right to interest was excluded by the terms of the contract : and see *Lewis v. Tucker*, 5 Jur. 1105, V. C. W. ; but see also *Euraght v. Fitzgerald*, 2 Dru. & W. 43, where interest seems to have been allowed only from the time when a good title could have been made.

(*u*) See *Waldron v. Forester*, cited *Sug*. 799.

Chap. XIII.

est. Many cases have occurred, in which the augmented value by growth, between the time of entering into the contract and the completion of it, has not been equal to the depreciation in the market price of the timber during the same period."

Principle which should determine the liability.

It is, very deferentially, submitted that the above remark is scarcely pertinent to the principle upon which the rule may be supported; viz., that there is an increase, (not in the market price,) but in the actual quantity or quality of the subject-matter of the contract: the case, in effect, is this; the vendor agrees to sell the timber as existing at the time of contract, *plus* its future increase up to the date of the valuation, upon being paid the then estimated value of such timber and increase; he takes the chance of a rise or fall in the market value of timber as a commodity; and a fall, can, it is submitted, no more justify him in requiring interest prior to the valuation, (*i. e.*, in effect an increase of purchase-money,) than an unexpected rise would warrant the purchaser in claiming a reduction of the purchase-money, upon the ground of its being of larger amount than he had anticipated.

Timber arrived at maturity.

Nor does it appear that, in the case of timber which has arrived at maturity, interest ought, as a general rule, to be paid prior to the valuation; for there has been no increase, nor any advantage to the purchaser: the case might, however, probably be different, if he had been the cause of, or consenting to, the delay in the valuation; or if, the chief value of the timber consisting in its ornamental character, he had been in possession of the estate.

Interest upon valuation of fixtures—occupation rent in respect of;

The case of fixtures, agreed to be taken at a valuation, seems to be the converse of that of growing timber; they being a *deteriorating* property. Where they are of large value, the purchaser, if let into possession before the valuation, ought, it is conceived, to pay an occupation rent up to the date of the valuation; the case seems to be, con-

versely within the principle of *Dyer v. Hargrave* (*w*), where Chap. XIII.
it was decided that when, upon the sale of leaseholds, the and of
vendor retains possession after the time fixed for comple- leaseholds.
tion, he must pay an occupation rent to the purchaser, and
receive interest upon the purchase-money.

But where, upon a sale of the lease of a public house Vendors re-
and the stock in trade, the purchaser wrongfully refused to taining pos-
perform the contract, and the vendors retained possession session of
and carried on the business, the purchaser was compelled trade pre-
to pay interest on his purchase-money, and also all sums mises yet
which the vendors had laid out for rent, taxes, and other not held
necessary outgoings, with interest; and was not allowed liable to
to charge the vendors with an occupation rent (*x*). It occupation
may be observed of this case, that the vendors could not rent.
have discontinued the business without incurring the risk
of the property being seriously depreciated while the com-
pletion of the contract yet remained uncertain: but it was,
nevertheless, held on appeal, that they carried it on at their
own risk, (and, it is presumed, for their own benefit,)
subject to their liability to account to the purchaser for so
much of the stock included in the contract as they had
actually disposed of.

The cases do not seem to define satisfactorily what is a What a suf-
sufficient appropriation of money by the purchaser to ficient ap-
relieve him from the liability to interest: in *Winter v. propriation*
Blades (*y*), the purchaser, upon entering into the contract, of purchase-
paid into his general account at his banker's a sum less than money to
the purchase-money, but which, together with his existing relieve pur-
balance, exceeded the purchase-money; and until comple- chaser from
tion his balance was never less than the purchase-money, interest.
except for a period of three days; and the Court discharged
him from payment of interest, in respect of the difference
between his average balance for the period between the

(*w*) 10 Ves. 510.(*x*) *Dakin v. Cope*, 2 Russ. 176.(*y*) 2 Sim. & St. 393.

Chap. XIII. date of his notice to the purchaser and completion, and his average balance for three years immediately preceding the contract: thus establishing, (apparently,) two principles; viz., first, that appropriation of a *part* of the purchase-money relieves the purchaser from payment of interest *pro tanto*; and secondly, that payment into his general banking account is an appropriation: the latter (if not the former) of which, seems to be disapproved of by Sir *E. Sugden* (z); and both appear to be questionable.

Actual *bonâ fide* appropriation requisite.

Payment into Bank at call.

Sir *E. Sugden* observes, "If the money was not actually and *bonâ fide* appropriated for the purchase, or the purchaser derived the least advantage from it, or in any way made use of it, the Court would compel him to pay interest;" if, therefore, the purchaser pay the money into a Bank at which he has an account, it is at least prudent to make the payment to a separate account; in many of the Joint-stock Banks interest, at a low rate, is allowed upon sums deposited; and it is conceived, that, in such a case, if the money were payable at call or upon short notice, the purchaser upon giving the usual notice to the vendor would escape liability in respect of the difference of interest.

Purchaser acceding to delay cannot afterwards appropriate purchase-money.

When it appears that some considerable time must elapse before the title can be perfected, and the purchaser agrees to take possession and pay interest, he cannot, (unless there be great and unexpected delay,) by subsequently appropriating the purchase-money and giving notice, escape his liability to interest (a).

Express agreement to pay interest—effect of.

The Law upon the general subject seems in its application to cases where there is a special condition as to interest, to be in an unsettled state: it has been held, that a general agreement by the purchaser to pay interest during delay in completion will bind him during delay caused

(z) Sug. 795; and see *Macdonnell v. Harding*, 7 Sim. 178.

(a) *Dickinson v. Heron*, Sug. 797.

by the vendor (*b*) : this decision, however, is disapproved of by Sir *E. Sugden* (*c*) ; and two subsequent cases (*d*), in which it was decided that agreements to pay interest during delay caused by “any unforeseen or unavoidable obstacles,” or “any unavoidable obstacle,” “did not apply to delays in making out the title, seem seriously to affect its authority : where, however, the agreement was to pay interest during delay arising from “any cause whatever except the wilful (*e*) default of the vendor” (*f*), or, simply, “from any cause whatever” (*g*), (an expression not so strong against the purchaser as the former one, inasmuch as, the particular exception of “wilful default” increased the stringency of the first part of the sentence,) it was held, that interest was payable during delays occasioned by the state of the title ; but, in the latter case (*h*), the order was made without prejudice to any application by the purchaser for compensation : and a different decision was come to, when the expression was, “if from any cause whatever the purchase-money shall not be paid on, &c., the purchaser *making default* shall pay interest” (*i*) ; and, of course, a condition containing the words “any cause whatever,” even without anything to qualify their effect, would not authorize wilful delay on the part of the vendor (*k*) : in a very recent case, where the expression, upon a sale by the Court, was, “if the purchaser shall fail in making such payments at the time and in

Chap. XIII.

“Unavoidable obstacle.”

“Any cause whatever except wilful default.”

“Purchaser making default.”

“Purchaser failing in making payment.”

(*b*) *Esdaile v. Stephenson*, 1 Sim. & St. 122 ; see *Matson v. Swift*, 5 Jur. 645, R.

(*c*) Sug. 807.

(*d*) *Monk v. Huskisson*, 4 Russ. 121, n. ; *Birch v. Podmore*, Sug. 807.

(*e*) As to what is wilful default, see *Elliott v. Turner*, 477 ; *Ex parte Bradshaw*, 16 Sim. 174.

(*f*) *Oxendon v. Lord Falmouth*,

Sug. 807.

(*g*) *Greenwood v. Churchill*, 8 Beav. 413.

(*h*) *S. C.*

(*i*) *Denning v. Henderson*, 1 De G. & S. 689 ; and see, at Law, *Perry v. Smith*, 1 Car. & M. 554 ; stated *supra*, p. 59.

(*k*) See *Paton v. Rogers*, 6 Madd. 256.

Chap. XIII.

*De Visme v.
De Visme.*

manner aforesaid, then and in such case, from whatever cause the delay may have arisen," interest to be paid at 5*l.* *per cent.*, and no abstract was delivered until after the time fixed for completion, and the supplemental abstracts, showing a good title, were not delivered, although repeatedly applied for, until eighteen months after the time fixed for completion, and the purchaser at the commencement of the delay paid the purchase-money into a bank at a low rate of interest, and gave notice thereof to the Vendors, and that he should require compensation, and then, upon the title being cleared up, obtained an order for a conveyance and for payment of his purchase-money into Court without prejudice to his right (if any) to compensation, and the purchase was accordingly completed, a petition for compensation in respect of the loss of interest was dismissed by Sir *J. Wigram*, V. C., with costs, upon the ground of the purchaser having completed the contract; but it seems to have been admitted that, while the contract remained incomplete, he might have obtained relief, or might probably have abandoned the contract (*l*): and the decision of the V. C. was reversed by Lord *Cottenham* on appeal; his Lordship holding, either that interest did not begin to run until the delivery of an abstract showing a good title, or that, if the condition bound the purchaser to pay interim interest, he was entitled to compensation for the non-performance by the vendor of his part of the contract (*m*).

But, in the same case, when, it having been decided that the right to interest on the one hand, and to the income of the estate on the other, was not to commence until a good title was abstracted, the purchaser applied for compensation in respect of his money having been comparatively unproductive in the interim, (it having, as before

(*l*) *De Visme v. De Visme*, 13 Jur. 205.

336; and see *Skelton v. Robertson*, 14 Jur. 323, R.

(*m*) *S. C.* on appeal, 1 Mac. & G.

stated, been paid into a bank at a low rate of interest upon notice to the vendors,) his Lordship held that the claim could not be sustained. His Lordship observed—"My opinion is, that, the vendors being in default, the delay having been occasioned by their not performing their part of the contract, are not to exact from the purchaser the payment of interest until the time they showed a good title on their abstract. The effect of that is to postpone the day agreed on for the completion of the contract until the time when the vendors put themselves right, and showed their title to be good on the abstract. The result, therefore, is, until that time there would be no demand to be made by the vendors for the payment, and therefore the interest, which was to stand in the place of that payment, had not commenced to run: it did run when they showed a good title, and not before. The purchaser is to have compensation for the loss and injury which he sustained by the non-performance of the contract by the vendors; but the vendors are not, therefore, to make compensation for any loss not arising out of their contract; that default on the part of the vendors not making it necessary or proper for the purchaser to lay his money by and make it unproductive, for the purpose of throwing the loss of that unproductiveness on the vendors. I think it is carrying the principle out strictly, to postpone the time for paying the purchase-money till the time a good title was shown. The vendors would be entitled to the rents and profits up to that time, and the purchaser's liability to pay interest would commence from that time, and the Master must inquire when that time was" (*n*).

This decision, it is very deferentially submitted, leaves the law on this subject in an unsatisfactory state, and will probably lead to future litigation: it may be admitted that when a purchaser has agreed to pay interest and take

(*n*) 1 Mac. & G. 353.

Chap. XIII. the profits from a specified day, notwithstanding delay arising from any cause whatever, there would be much hardship (at least in cases where personal possession of the property is essential to its due enjoyment) in holding this agreement to extend to a delay in showing such a title as would justify a prudent purchaser in accepting possession and so receiving the equivalent for his interest; but if, on the ground of hardship, the strict words of the agreement (which are sufficiently large in terms, and are notoriously intended in practice, to extend to delays in making out the title) may be disregarded, surely, on the like principle, the purchaser (who may possibly have called in money upon the faith of the vendor's agreement to complete on a certain day) ought to be allowed to appropriate and re-invest it in such a manner as that it may produce some income and yet be ready when required, and to throw the loss of interest on the vendor; in the particular case the purchaser seems to have been left in no better position than that in which he was placed by the decision of the Vice-Chancellor.

And it is conceived that if a vendor abstract a good title but be unable at once to verify it, the time for the commencement of interest must be postponed until such title be satisfactorily verified; so, if an imperfect title be abstracted, or insufficient evidence be given of an apparently perfect title, interest, it is conceived, must commence from the time when the purchaser agreed to accept the imperfect title or insufficient evidence: it is evident that the practical application of the rules laid down in, and deducible from, *De Visme v. De Visme*, must in many cases be a matter of very considerable difficulty.

An agreement which reserves to the vendor the rents and profits of the estate until actual completion, precludes any claim to interest on the purchase-money (*o*).

Vendor's
right to
interest ex-
cluded by
agreement
to take
rent and
profits.

(*o*) *Brooke v. Champenowne*, 4 Cl. & Fin. 589.

The vendor may, occasionally, claim an increase of purchase-money, upon the ground of an excess in the actual quantity of the estate over that stated in the particulars.

By the 5 Geo. IV. c. 74, ss. 1 and 2, the pole or perch is to contain in length five standard yards and a half; the rood, 1210 standard yards; and the acre, 4840 standard yards, being 160 square poles: and, by the 15th section, after the 1st May, 1825, "all contracts, bargains, sales, and dealings which shall be made or had within any part of the United Kingdom, for any work to be done, or for any goods, wares, merchandise, or other thing to be sold, delivered, done, or agreed for by weight or measure, where no special agreement shall be made to the contrary, shall be deemed, taken, and construed to be had and made according to the standard weights and measures ascertained by the Act; and in all cases where any special agreement shall be made, with reference to any weight or measure established by local custom, the ratio or proportion which every such local weight or measure shall bear to any of the said standard weights or measures, shall be expressed, declared, and specified in such agreement, or otherwise such agreement shall be null and void."

The 5 & 6 Will. IV. c. 63, s. 6, enacts "that the measure called the Winchester bushel and the lineal measure called the Scotch ell, and all local and customary measures shall be abolished."

Before the passing of these Acts considerable diversity existed in the size of the acre; in some places (as in Cheshire) the customary acre contained nearly two statutory acres; while, occasionally, the variation was nearly as much the other way (*p*): the applicability of the 15th section of the Act of Geo. IV. to contracts for sale of land is not altogether clear (*q*); but, it is conceived, that, under the later Act, any quantities mentioned either in a con-

Chap. XIII.

Increase of purchase-money in respect of excess in quantity.

As to quantity—Statutory Acre.

Local Measures abolished.

Customary variations in the Acre.

(*p*) *Portman v. Mill*, 2 Russ. 570.

(*q*) Sug. 376.

Chap. XIII. tract or a conveyance would be referred to the standard measurement, without regard to any local custom (unless expressly referred to) (*r*).

Where there is no express agreement on the subject, and the contract in general terms includes property which it was not proposed to sell, Equity would not enforce it against the vendor, without at least giving him compensation (*s*) ; but we are not aware of any case establishing his general right to additional purchase-money, merely because the estate exceeds the quantity stated in the particulars ; since, however, if it were sold professedly by the acre, the excess, if taken, must, it is conceived, clearly be paid for, it seems to follow, from the doctrine laid down in *Hill v. Buckley* (*t*), (viz., that where the quantity is stated the price must be considered as fixed with reference thereto) that if called upon to fulfil the contract, he might, independently of agreement, claim compensation : but the general understanding and practice seem to be the other way.

Vendor's right to compensation is generally questionable.

And even where there is a condition for compensation to the vendor, his rights, in any given case, seem far from clear : as is observed in a recent work on conveyancing (*u*), "It must indeed be a very strong case of mistake for a vendor (who has full means of ascertaining, with the utmost accuracy, what he intends to sell) to succeed in obtaining compensation, or, in other words, an increase of his purchase-money, for an alleged mistake he has himself made : " in a case (*w*) where fields described as "fourteen acres more or less," were sold for 973*l*., under an order of the Court, and with the usual condition as to misdescrip-

Alleged under-value from measurement being given in custom-

(*r*) And see *Portman v. Mill*, 2 Russ. 570.

(*s*) See *Att.-Gen. v. Sitwell*, 1 You. & C , Ex. 559 ; *Marquis Townshend v. Stangroom*, 6 Ves. 328 ; see *Tyler v. Beversham*, Rep. t. Finch, 80 ;

Alvanley v. Kinnaird, 2 Mac. & G. 1. (*t*) 17 Ves. 394, 401.

(*u*) Davidson, vol. iii. p. 34.

(*w*) *Price v. North*, 2 Y. & C., Ex. 620.

tion, a petition stating that the fields in fact contained twenty-seven statutory acres (the acres mentioned in the particulars being intended for customary acres) and that the real value was 1600*l.*, and praying that the purchaser might pay the difference or that the property might be resold, was dismissed with costs; the decision however was chiefly on the ground of delay, four years having elapsed since the sale; this case may, perhaps, be considered to differ in principle from cases where there is a misstatement of quantity incapable of being explained by the difference between statutory and customary measurement; for, possibly, the purchasers at the sale might have bid under the full impression that the fourteen acres were in fact customary acres, and this was alleged to have really happened; Sir *Edward Sugden's* remark (*x*) upon the case is, "that no doubt it would be difficult in such a case to make a *bonâ fide* purchaser buy an estate twice as large as that for which he had contracted, and pay double the amount of the purchase-money for it:" and it may, perhaps, be doubted whether, in any ordinary case, a purchaser could be compelled under such conditions to pay a sum materially exceeding the contemplated amount of purchase-money; such an unexpected liability might, it is obvious, be often productive of the most oppressive and ruinous consequences: in the above case the Court seems to have considered that had any relief been granted, it must have consisted in avoiding the sale altogether.

As to the right to compensation in respect of variations in the quality of the estate,—there does not appear to be any case in which a vendor has obtained an increase of purchase-money upon the ground of the character of the property being better than he had himself described it.

On the other hand, the purchase-money is liable to be

Chap. XIII.
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ary instead
of statutory
acres—no
compensa-
tion.

Difficulty of
forcing a
more ex-
pensive
purchase on
a purchaser.

Variations
in quality of
estate—no
allowance
seem in
favour of
vendor.

Purchase-

(*x*) *Sug.* 372.

Chap. XIII.
money, how
diminished.

diminished by deductions, either in respect of proceeds of the estate received, or which ought to have been received by the vendor, and which belong to the purchaser; or in respect of mere deteriorations to the estate; or of original defects in the estate.

By proceeds
of estate
received or
which might
have been
received by
vendor.

As to deductions of the first description;—We have already seen that the entire inheritance belongs to the purchaser from the date of the contract (*y*), but that the profits or income belong to him only from the time fixed for completion; if, therefore, timber be blown down (*z*), or felled, or stone or minerals be quarried or worked after the date of the contract, the proceeds must be accounted for at completion: so, the vendor must account for such rents and profits as he has, or might, but for his wilful default (*a*), have received, from the time appointed for completion up to such time as the purchaser has, or might safely have, taken possession (*b*): and in one case, where many years' delay had occurred by the default of the vendor who had received part of the purchase-money and retained possession of the estate, he was charged with interest at *4l. per cent.* upon a proportionate part of the rents (*c*).

By amount
of deteriora-
tions to
estate,
through
fault of
vendor.

As to deductions of the second description;—The vendor from the date of the contract holds the estate in trust for the purchaser, subject to payment of the purchase-money; with a right until the time fixed for completion to receive the interim profits; if, therefore, by his wilful acts (*d*), or mere negligence, he permit the property to deteriorate,—as by allowing hedges and fences to get out of repair, or the land to remain uncultivated (*e*), or by an

(*y*) *Supra*, p. 116.

(*z*) *Ibid.*

(*a*) *Acland v. Gaisford*, 2 Madd.
28; *Wilson v. Clapham*, 1 Jac. &
W. 36.

(*b*) *Vide supra*, p. 294.

(*c*) *Burton v. Todd*, 1 Swanst.

255.

(*d*) 3 Madd. 395.

(*e*) *Foster v. Deacon*, 3 Madd. 394.

improper course of husbandry (*f*), or by ejecting tenants, or acting so improvidently as to occasion their loss (*g*),—the purchaser is entitled to an allowance: and, of course, deterioration may be of such a nature, or to such an extent, as to relieve him from the contract (*h*); and the vendor must answer for deteriorations occasioned by the conduct of his tenant, even although the lease has expired (*i*): but not for deteriorations after the time fixed for completion, if the title shown were such that the purchaser ought to have taken possession (*j*).

So, also, compensation may be due to the purchaser out of the purchase-money in respect of original defects in the estate, either as respects its quantity, or quality, or the extent of the vendor's interest therein; it may be convenient here to consider those questions which relate merely either to the quantity or quality of the estate; reserving for separate discussion, under the head of specific performance, those questions which are in fact questions of title (*k*).

Abatement in purchase-money in respect of original defects in estate.

The purchaser will be entitled to compensation for a deficiency in quantity, even although the estate be not sold professedly by measurement (*l*); and although, of course, he could not claim compensation if it appeared that he contracted with a knowledge of the deficiency, such knowledge will not be assumed from the fact of his being intimately acquainted with the estate (*m*), or even being the occupying tenant (*n*); nor is the right to compensation precluded by a condition that he shall not object to complete his purchase if the quantity should turn out

Abatement allowed for deficiency although land not professedly sold by the acre.

Knowledge of deficiency not readily attributed to purchaser.

(*f*) *Lord v. Stephens*, 1 Y. & C. 332.
Exch. 222.

(*k*) *Vide infra*, Ch. XVIII.

(*g*) *Harford v. Purrier*, 1 Madd. 532.

(*l*) *Hill v. Buckley*, 17 Ves. 394, 401; *King v. Wilson*, 6 Beav. 124.

(*h*) *Vide infra*, Ch. XVIII.

(*i*) 3 Madd. 395.

(*m*) See *Shackleton v. Sutcliffe*, 1 De G. & S. 603.

(*j*) *Minchin v. Nance*, 4 Beav.

(*n*) *King v. Wilson*, 6 Beav. 124.

Chap. XIII. less than that stated in the particulars (o) ; nor by acts which amount to a waiver of objections to the title (p).

As to the effect of the expressions "by estimation," "more or less," &c., being added to statement of quantity.

The above rule, where the estate is professedly bought by the acre, or (which is the same thing) (q) where the quantity is stated and there is nothing to rebut the ordinary presumption of price having been fixed with reference to quantity, may, it is conceived, be strictly enforced where no words are introduced to qualify the statement as to quantity ; the qualifying expressions, "by estimation," and, "be the same more or less," are, however, in very general use ; and the cases do not seem to define their precise effect : they have been held to cover a deficiency of upwards of five out of forty-one acres (r) ; but not of 100 out of 349 acres (s) ; so, in a case of *Gell v. Watson* (t), similar expressions were not allowed to cover a deficiency of two acres in two closes forming part of a much larger estate, the quantity of the two closes being stated to be (*according to a specified plan*) 8 a. 1 r. 4 p.

What deficiency they will cover.

Seem—only deficiencies in the fractional parts of the acre, when the description particularizes fractional parts.

And where land is described thus particularly, by stating not only the acres but also the roods, or roods and poles, these qualifying expressions cannot, perhaps, be held to provide for more than inaccuracies in the roods or poles (u) ; and, of course, a vendor cannot, in any case, rely upon such expressions, if he fraudulently misstate the quantity (v).

Purchaser's right confined to compensation.

The purchaser's right is strictly to compensation, and not necessarily to an abatement of purchase-money proportionate to the surface deficiency : thus, where, upon the sale of woodlands, the value of the timber was correctly stated, but the land was represented to contain

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| (o) <i>Frost v. Brewer</i> , 3 Jur. 165. | (s) <i>Portman v. Mill</i> , 2 Russ. 570. |
| (p) <i>Calcraft v. Roebuck</i> , 1 Ves. jun. 221. | (t) Sug. 372. |
| (q) 17 Ves. 401. | (u) 17 Ves. 401 ; 9 Jarm. Conv. by S. 37. |
| (r) <i>Winch v. Winchester</i> , 1 Ves. & B. 375. | (v) 1 Ves. & B. 377 ; Sug. 371. |

more by twenty-six acres than the actual quantity, he was allowed, as compensation, the estimated value of twenty-six acres of woodland *minus* the wood (*w*): the case is valuable as illustrating a principle, but, as a decision between parties, its justice may be thought questionable: for it is clear that in purchasing woodland (unless there be no *growing timber*), the value of the estate depends, not only upon the present worth of the timber and of the land apart from it, but upon the two taken together, with reference to the relative situations of the trees being such as to afford them sufficient nourishment and full space to arrive at maturity.

As respects the quality of the estate,—A purchaser, it appears, may claim compensation in respect of any deficiency which “admits of a certain estimation” (*x*); for instance, he may claim it for dilapidations of a house described as “in good repair” (*y*), or for the want of cultivation of land described as being in “a high state of cultivation” (*z*), but not for that which does not admit of a pecuniary equivalent; for instance, it is doubtful whether compensation could be claimed in respect of the land lying dispersed, instead of within a ring fence, as described (*a*); although such a variation might be sufficient to avoid the sale: and he cannot claim compensation in respect of a misdescription known to him when he entered into the contract (*b*).

Chap. XIII.

Surface deficiency on sale of woods.

Abatement in purchase-money in respect of deficiency in quality may be claimed, when.

(*w*) *Hill v. Buckley*, 17 Ves. 394.

(*z*) *Dyer v. Hargrave*, *ubi supra*.

(*x*) 10 Ves. 508.

(*a*) *S. C.*; *Fewster v. Turner*, 6

(*y*) *Dyer v. Hargrave*, 10 Ves. Jur. 144.

505; *Grant v. Munt*, G. Coop. 173.

(*b*) See last note.

Chap. XIII.

(5.) *To whom and how purchase-money should be paid.*

Agent or
solicitor of
vendor not
authorized
as such to
receive pur-
chase-
money.

How the
same should
be paid.

The agent (*c*) or solicitor (*d*) of the vendor, cannot, without special authority, receive and give a discharge for the purchase-money; and the usual indorsed receipt is in Equity no conclusive evidence of payment (*e*); the money, therefore, should in strictness be paid to the vendor, or upon his written authority; and, in the case of a fiduciary vendor, care should be taken that the proposed mode of payment does not involve a breach of trust; *e. g.*, it is a breach of trust for trustees for sale to authorize their solicitor to receive the purchase-money (*f*): and of course it cannot, except under a special power in the instrument creating the trust, be safely paid to fewer than the entire body of trustees (*g*): when an agent is empowered to receive it, there must be a *bond fide* payment; for instance, it cannot be set off against a private debt due from him to the purchaser (*h*), unless the vendor, being indebted to the agent, have authorized him not merely to receive, but to pay himself out of the purchase-money (*i*); so, if an agent be authorized to receive the money according to the contract, and it be paid to him in anticipation of the time therein named, the purchaser is liable for its due application (*k*): if a check be given for it, and, by reason of an unintentional non-compliance with the Stamp Act be so drawn that no action could be maintained upon it, and the bankers

(*c*) *Supra*, p. 86.

(*d*) *Sug.* 851.

(*e*) *Winter v. Lord Anson*, 3 Russ. 488; *infra*, Ch. XIV.

(*f*) See *Ghost v. Waller*, 9 Beav. 497.

(*g*) *Hall v. Franck*, 11 Beav. 519; *et vide supra*, p. 264.

(*h*) *Young v. White*, 7 Beav. 506.

(*i*) *Barker v. Greenwood*, 2 Y. & C.

Exch. 414; *Hanley v. Cassan*, 11 Jur. 1088, Exch.; as to how the loss of money, by the fraud of a person acting as agent for both parties, is to be borne, see *Vandaleur v. Blagrove*, 6 Beav. 565; on appeal, 11 Jur. 935; *Young v. Guy*, 8 Beav. 147.

(*k*) *Parnter v. Gaitskell*, 13 East, 432; *Cotman v. Orton*, 5 Jur. 142, C.

upon whom it is drawn fail before payment, or if, (supposing it to be valid and to be presented within a reasonable time,) the bankers upon receiving it with instructions to transmit the amount to London, on the same day, and before the usual hour for closing business, stop payment, the loss falls on the purchaser (*l*).

Chap. XIII.

Upon a sale in Bankruptcy, the purchase-money must be paid to the Official Assignee, unless the Court shall otherwise direct (*m*).

On sale in Bankruptcy.

Where A., in ignorance of the purchaser being an uncertificated bankrupt, advanced part of the purchase-money and paid it direct to the vendor, and the conveyance was handed over to him immediately after its execution, he was held to have a valid lien upon the property; although the purchaser at the same time signed a memorandum stating that he had deposited the deed with A. as a security for the advance (*n*).

Lien of third party advancing part of the purchase-money, as against purchaser's assignees in Bankruptcy.

Upon a sale by a mere statutory owner, under the Lands Clauses Consolidation Act, 1845, the entire purchase and compensation moneys, if amounting to 200*l.*, must be paid into the bank, or (if under 200*l.* but exceeding 20*l.*), into the bank or to trustees, and be applied in manner directed by the 69th and following sections of the Act; and no part thereof can be safely paid to such statutory owner (*o*), and the above provisions extend to moneys agreed to be paid to him for assenting to or not opposing

Payment of consideration-money upon sale by statutory owners to Railway Companies, &c.

(*l*) *Bond v. Warden*, 1 Coll. 583.

(*m*) 12 & 13 Vict. c. 106, s. 39.

(*n*) *Meux v. Smith*, 11 Sim. 411;

which see, as to the usual mode of payment for public houses. *Bond fide* payments by purchaser, after his secret act of bankruptcy but before petition, are protected by 12 & 13 Vict. c. 106, s. 138.

(*o*) As to apportionment, between lessee and reversioner, of purchase money paid into Court with reference

to sect. 74 of Act, see *Ex parte Ward*, 2 De G. & S. 4. Purchase money of lands of a municipal corporation may be applied in redeeming incumbrances upon any other lands of the same corporation; *Ex parte Corporation of Cambridge*, 6 Ha. 30; an order for the re-investment of part of the money in land may go on to direct that the balance, if less than 20*l.*, be paid to the tenant for life; *Re Lord Egremont*, 12 Jur. 618.

Chap. XIII.

the passing of the bill authorizing the taking of the lands ; but the Court of Chancery or the Trustees, as the case may be, may allot to him a portion of the sum so paid, as a compensation for personal injury, inconvenience or annoyance (*p*).

Primâ facie
right
thereto of
parties in
possession
of the land.

Where a Railway Act provided that where any question should arise upon the Act touching the title to any lands, &c., "the parties who should have been in possession or receipt of the rents or profits of such lands at the time of such purchase," &c., should be deemed to have been lawfully entitled, &c., according to such possession until the contrary should be shown to the satisfaction of the Court," and the capital and income of the funds, &c., representing the purchase-money were to be paid and applied accordingly, it was held that the party in possession, but whose title was objected to by the Company, was entitled to have the money paid out of Court on his own affidavit of title (*q*) : the 79th section of the Lands Clauses Consolidation Act, 1845, contains provisions of a similar nature, but with variations of expression which might probably induce the Court to refuse to follow a precedent evidently open to serious objections.

What affidavit
necessary on
Petition for
payment
out of
Court.

In all petitions under Acts of Parliament for sale of property for public purposes, when the purchase-money is directed by the Act to be paid into Court, the petitioners claiming to be entitled to the money so paid in, must, in addition to the usual affidavit verifying their title, make oath that they believe they have a good title, and are not aware of any right in any other person, or of any claim made by any other person, to the sum mentioned in the petition or any part thereof (*r*) ; and an affidavit to this

(*p*) Sect. 73 ; see *In re the Duke of Marlborough's estates*, 13 Jur. 738.

(*q*) *Ex parte Grainge, re Great Western Railway Acts*, 3 Y. & C. 62, and see cases cited, p. 66.

(*r*) Letter of Lord Chancellor to Senior Registrar, dated 12th February, 1842 ; see 16 L. J., N. S., Ch. 72.

effect will not be dispensed with, although the petitioner be aged and infirm, and the Company have contracted with him, accepted his title and consented to the prayer of the petition (*s*) : where a person entitled to an aliquot share of a sum of money so brought into Court petitions for payment of his share, he need not give notice to the parties entitled to the other shares (*t*) ; nor, where an order has been made for the payment of the interest to a single woman, need the Company be served with a petition for its payment to her and her husband on her marriage (*u*).

The Court has refused to sanction the investment of money so paid into Court in the purchase of an equity of redemption, or of land the title to which has not been approved by the Master (*w*) : and has refused to interfere with the Master's decision who reported generally against the propriety of an investment on mortgage (*x*) : an investment in land of a different tenure from that which produced the fund is generally improper, but has been allowed under special circumstances (*y*) ; where the fund has arisen from land belonging to an ecclesiastical corporation sole, the income has been ordered to be paid to the petitioning incumbent, so long as he remained incumbent, and afterwards to the incumbent *for the time being* (*z*).

What mode of reinvestment thereof will be sanctioned by Court.

(*s*) *Ex parte Hollick*, 16 L. J., N. S., Ch. 71.

(*t*) *In re the Midland Counties Railway Company*, 11 Jur. 1095, R.

(*u*) *Ex parte Hordern*, 2 De G. & S. 263.

(*w*) *Ex parte Craven*, 17 L. J., N. S., Ch. 215, V. C.

(*x*) *Ex parte Francklyn*, 1 De G. & S. 528.

(*y*) *In re Cann's estate*, 19 L. J., Ch. 376, V. C. K. B.

(*z*) *In re the Archbishop of Canterbury*, 1 De G. & S. 365 ; *vide infra* as to costs ; and see *In re the Buckinghamshire Railways*, 5 Rail. Ca. 702.

Chap. XIII.

(6.) *As to purchaser's right to deeds, attested copies, &c.*

Purchaser's
right to
delivery of
muniments
of title.

The purchaser, upon completion, is entitled (subject to the exceptions hereinafter noticed) to all deeds and other muniments of title, however ancient, which are in the possession or power of the vendor (*a*) : and it is conceived that the vendor, (unless he retain property held under a common title,) has in general no right to keep copies of any documents other than those which subject him to some future personal liability.

Where he
purchases
only part of
the estate.

Where, however, the purchaser does not buy all the estate, but a part either remains in the vendor or is sold to another purchaser, the practice (in the absence of agreement) is, for the holder of the largest portion to take the deeds and covenant for their production : but the fact of the vendor having already covenanted for production to a former purchaser, will not, in the opinion of Sir *E. Sugden* (*b*), justify him in refusing to deliver the deeds, if the second purchaser will allow notice of the covenant to appear in or upon his conveyance, and will covenant to perform the prior covenant : this covenant by the second purchaser would, of course, be entered into with the first purchaser, if the vendor's covenant was made determinable upon his procuring, or the first purchaser will accept, such a substituted covenant ; or otherwise with the vendor himself, and would then take the shape of a covenant to produce the deeds, &c., and to indemnify him against liability under the former covenant.

Vendor
having
covenanted
to produce
deeds to
other par-
ties not
therefore
entitled to
retain them.

Sale under
a settle-
ment.

Where property is sold under a trust for sale in a settlement, which goes on to declare trusts of the purchase money (whether the same is to continue money or to be reinvested in real estate), it is conceived, that the existence

(*a*) Sug. 454 ; 1 Jarm. Conv. by S. W. 393.
63 ; *Austin v. Croome*, 1 Car. & M. (*b*) Sug. 456.
653 ; *Smith v. Chichester*, 2 Dru. &

Chap. XIII.

of the trusts gives no right to the trustees to retain the settlement; but the purchaser must covenant to produce it, even although he buy the entire property: in order to avoid this difficulty, it is usual, where an absolute conversion is intended, to settle the money by a deed distinct from that containing the trust for sale: or, perhaps, the proper rule in cases of several sales under a settlement may be, that, unless the trustees retain a sufficient part of the estate to warrant its retention, it should be deposited for the benefit of all parties until performance of the trusts, and then delivered to the largest purchaser upon his entering into covenants for its production: the right to the deed considered as an instrument creating *terminable* trusts, may, perhaps, be considered as governed by a case (*b*) in which, upon the purchase of a part of an estate in lease, the Court thought that the counterpart of the lease ought to be deposited for the benefit of all parties.

Deposit of the settlement until completion of the trusts.

Deposit of lease on purchase of the reversion.

Where a mortgagee of distinct properties belonging to distinct mortgagors transfers the mortgage debts by one deed without their consent, he will have to pay for the necessary attested copies of the deed which he has thus made common to the several titles, and of the necessary covenants for its production (*c*).

Liability of mortgagee settling several mortgages by a single deed.

And the purchaser, it appears (*d*), has no right either to the custody, or to a copy, or to a covenant for the production, of instruments produced merely as negative evidence to satisfy him that they contain nothing affecting the title (*e*).

Purchaser not entitled to deeds used as negative evidence.

If the deeds themselves are not delivered, the purchaser (in the absence of stipulation) may require attested copies at the vendor's expense (*f*). It has been observed by

Purchaser's right to attested copies of originals not given up.

(*b*) *Shore v. Collett*, G. Coop. 234.

(*e*) Sug. 458.

(*c*) *Capper v. Terrington*, 1 Coll. 103.

(*f*) *Dare v. Tucker*, 6 Ves. 460; *Boughton v. Jewell*, 15 Ves. 176;

(*d*) *Vide supra*, pp. 158, 166.

Berry v. Young, 2 Esp. 640.

Chap. XIII. Lord *Eldon*, that purchasers set an undue value upon these copies ; that, except as between the parties themselves, they are waste paper upon an ejectment (*g*) : nevertheless they are, it is conceived, of considerable practical importance, if the property is likely to be resold ; for the ordinary condition, making them evidence without production of the originals, seldom prejudices a sale ; whereas the absence both of originals and attested copies might often cause a serious deficiency in price.

Restriction
upon such
right.

The right, however, seems to be confined to such documents as are necessary to make out a marketable title (*h*) : nor does it seem to extend to copies of Court Roll, or deeds enrolled under Statutes which require enrolment (*i*), or, in Sir *E. Sugden's* opinion, to “deeds enrolled for safe custody in a Court of Record,” or “wills registered and accessible” (*k*) ; but the practice in this respect does not appear to be settled (*l*). If, however, the vendor is in possession of attested copies of enrolled deeds, &c., the purchaser can claim them, unless larger property, held by the same title, is retained by the vendor or sold to another purchaser (*m*).

Purchaser
also entitled
to covenant
for pro-
duction of
originals.

And the purchaser, as respects deeds of which he can claim attested copies at the vendor's expense, is also entitled (at the like expense) to a covenant for the production of the originals, and also to a covenant for the production of such copies of Court Roll, and instruments on record as are in the vendor's possession or power (*n*) ; but the expenses of future production are borne by the purchaser (*o*).

Absence of

And it must be remembered, that although the pur-

(*g*) 6 Ves. 460.

(*l*) 9 Jarm. Conv. by S. 10.

(*h*) *Dare v. Tucker*, 6 Ves. 460 ;

(*m*) Sug. 476.

Cooper v. Emery, 1 Phill. 388.

(*n*) *Berry v. Young*, 2 Esp. 640,

(*i*) See *Cooper v. Emery*, *ubi supra* ;

n. ; *Cooper v. Emery*, 1 Phill. 388.

Campbell v. Campbell, Sug. 475.

(*o*) *Berry v. Young*, *ubi supra*.

(*k*) See Sug. 476.

chaser cannot require the production of original copies of Court Roll, or enrolled deeds, &c., if not in the possession or power of the vendor, he yet may, and should in all ordinary cases, inquire into the reason of their non-production; that is, if their date and character warrant the supposition that they may be denied with an improper motive: for in the well known case of *Whitbread v. Jordan* (*o*), the omission of a mortgagee to make inquiry on the subject was, under the particular circumstances, attributed to wilful blindness (*p*); and a similar decision has been pronounced by Sir *L. Shadwell*, V. C., in a very recent case (*q*).

Chap. XIII.

copies of Court Roll and deeds where production cannot be enforced should be explained.

Whitbread v. Jordan.

(7.) *As to matters necessary to insure the full effect of the executed conveyance.—Registration, enrolment, &c.*

If the property be subject to the operation of any of the local Registration Acts, a memorial of the conveyance should be registered as soon as practicable after execution; the register having (as before observed) been searched as closely as possible before completion; when dealing with respectable parties this rule as to immediate registration is often not very strictly attended to, but any departure from it is at the peril of the solicitor; by delay the purchaser is exposed to the risk not only of a subsequent fraudulent sale or mortgage by the vendor, (which may generally be considered merely nominal,) but also of prior unregistered incumbrancers (*r*), whose claims may perhaps be unknown even to the vendor, acquiring priority by registration between the execution and registration of the conveyance.

Conveyance should be entered in Local Register (if any).

Importance of immediate registration.

The exceptions in the Acts are of copyhold estates, leases at a rack-rent, and leases not exceeding twenty-one

What interests are excepted from the

(*o*) 1 Y. & C. 303.

Sim. 547.

(*p*) 1 Phill. 255; and see a note on the subject in 4 Y. & C. 564.

(*r*) As in *Martinez v. Cooper*, 2

Russ. 198.

(*q*) *Worthington v. Morgan*, 16

Chap. XIII. years where the actual possession and occupation go along
 Registration Acts. with the lease.

Copyholds. The exception of copyholds is not considered in practice to extend to such leases as would require registration if the estate were freehold (*s*) ; and Mr. *Rigge* recommends the registration of all such deeds affecting this description of property as are not usually recorded by the Steward of the Manor (*t*).

Leases at rack-rent—to what the exception of extends. The exception of the greatest practical importance is that of leases at rack rent ; Sir *E. Sugden* considers it to be the better opinion that the assignment of a lease held at what was originally a rack rent need not be registered in respect of its having become a valuable property ; perhaps, however, this is a doctrine which should be cautiously received in practice (*v*) : a lease which contains any *engagement* on the part of the lessee to build upon or otherwise improve the property, cannot, it is conceived, be considered as a lease at a rack rent within the meaning of the exception, although the rent may be reserved from the date of the lease, and may exceed what would be the annual value of the property if let for any other purpose.

Whether to building or repairing leases.

Leases for twenty-one years or under.

Of the third exception it need only be observed, that the words “possession and occupation” are in the conjunctive (*w*) ; so that, in order to avoid registration, the purchaser must not only buy the present interest in the lease, but must actually become the occupier of the premises.

London not affected by registration act.

The Middlesex Act has no operation within the City of London (*x*).

Registration of assignment of money charged on land, whether necessary.

It appears, that a deed assigning a legacy or other sum of money charged upon land, but not purporting to deal with the land itself, does not require registration (*y*) ; but

(*s*) Sug. 980.

(*x*) Sug. 982.

(*t*) Rigge on Registration, 88, n.

(*y*) *Malcolm v. Charlesworth*, 1

(*v*) Rigge, *ubi supra*.

Keen, 63 ; see p. 73.

(*w*) Rigge, *ubi supra*.

registration is not rendered unnecessary by the circumstance of the conveyance operating as an appointment pursuant to a power in a registered instrument (z).

Conveyances of lands taken under the provisions of the Lands Clauses Consolidation Act, 1845, are, it is believed, in practice registered in the local registers, the same as ordinary purchases; and this seems the proper course.

Upon purchasing from a devisee the will should be registered; and unless this has been or can be done within the period allowed by the Act it is by no means clear that a good title can be made without the concurrence of the heir (a).

As to the contents of the memorial which are required by the Legislature, see Sir *E. Sugden's* work, p. 972 (b). In recent practice, however, a somewhat fuller statement of the contents and effect of the deed is required at the registration offices, where forms are supplied for the guidance of the public: the registrars, it appears, may be required to register a *lithographed* memorial (c).

The memorial itself may be executed either by the vendor or purchaser, or either of their heirs, executors, administrators, guardians, or trustees; but one of the two attesting witnesses to the memorial should be a witness who attested the execution of the deed by (it is said) a *granting* party (d); where the attesting witnesses are dead, re-execution of the deed in the presence of a witness for the purpose of registration is useless (e).

(z) *Scrafton v. Quincey*, 2 Ves. sen. 413.

(a) See an article in 14 Jur. pt. 2, p. 267; but see also Sug. 967.

(b) 11th ed.; and see *Reg. v. Middlesex Registrars*, 15 L. T. 159, where the memorial was held insufficient: the stamp under the late Act is reduced to 2s. 6d.

(c) *Ex parte Iwemej*, 9 Jur. 371,

Q. B.; *Reg. v. The Middlesex Registrars*, 7 Q. B. 156.

(d) Sug. 970; and it was so decided in *Jack v. Armstrong*, Hud. & B. 727, 732; but see 9 Jarm. Conv. by S. 683, contending that it is sufficient if the witness attested the execution of the deed by *either party*.

(e) *Essex v. Baugh*, 1 Y. & C. C. 620.

Chap. XIII.

Of deed of appointment requisite.

Railway conveyances, &c., to be registered.

Will on purchase from devisee.

Memorial—its contents.

Attestation of.

Chap. XIII.

Where deed operates as a conveyance of several shares or estates.

And it may perhaps deserve consideration whether the above doctrine, (which was first advanced by Sir *E. Sugden*,) does not admit of extension ; his observation, (which gave rise to the decision in *Essex v. Baugh (f)*,) is as follows, "One of the witnesses" (*i. e.* to the memorial) "must be a witness to the execution of the deed ; and this must be understood to mean, not merely the execution by an unnecessary party, as the grantee, but the execution by the party from whom the estate moves ;" now where the estate is conveyed by several owners, say A., B., and C., each seised of an undivided share, and whose execution of the conveyance is attested by different witnesses, a memorial, attested only by the witness who attested A.'s execution of the deed, is evidently not attested by any witness to the execution of the deed considered as a conveyance of the shares of B. and C., such shares possibly constituting the bulk of the estate : this will, perhaps, appear more obvious if we suppose a purchaser to take by a single deed a conveyance of several distinct estates from several owners : it would seem to be prudent in all such cases to have the memorial attested by a witness or witnesses to the execution of the deed by all the several owners (*g*).

Registration on under Bedford Level Act.

As respects lands situate in the Bedford Level, it appears that conveyances omitted to be registered under the Bedford Level Act (*h*) are nevertheless valid for all purposes except for entitling the grantees to the privileges conferred by the Act on the owners of lands within the Level, and for the other purposes of the Act (*i*).

Conveyance to charity Trustee, as apparent beneficial owner, must be enrolled under the Mortmain Act.

Where a conveyance was made to a purchaser apparently as the beneficial owner, but the purchase-money was in fact part of a charitable fund, and the nominal purchaser by a subsequent deed in execution of a power

(*f*) *Ubi supra*.

(*h*) 15 Car. II. c. 17.

(*g*) But see 9 Jarm. Conv. by S.

(*i*) *Willis v. Brown*, 10 Sim. 127.

reserved by the conveyance, settled the property in favour of the Charity, it was held that both the conveyance and the subsequent settlement required to be enrolled in Chancery under the Statute of Charitable Uses (*k*). Chap. XIII.

Where the vendor is tenant in tail, it is essential to the validity of the deed, as against the issue in tail and remaindemen, that it should be enrolled in Chancery within six calendar months after its execution by the vendor (*l*) ; but if so enrolled it takes effect from the time of execution (*m*) ; except as against persons claiming for valuable consideration under a prior enrolled deed (although subsequently executed) and without express notice of the voidable estate created by the prior assurance (*n*) ; the enrolment may be made by either vendor or purchaser. On sale by tenant in tail—disentailing deed to be enrolled.

If there be a protector of the settlement, and his consent to the assurance be given by a separate deed, the consent-deed must be executed on or before the day on which the assurance is made by the tenant in tail, and must be enrolled in Chancery either at or before the time when the assurance is so enrolled (*o*). Consent of Protector.

A legal tenant in tail of lands held by copy of Court Roll may bar the entail by surrender ; and an equitable tenant in tail may bar the entail either by surrender or by deed (*p*) ; if the assurance be by deed, the same must, Assurances on sale by legal or equitable tenant in tail of copyholds : what entries

(*k*) 9 Geo. II. c. 36 ; *Att.-Gen. v. Gardner*, 2 De G. & S. 102 ; *Att.-Gen. v. Munro*, 2 De G. & S. 122 ; *quære*, as to the effect on the deed, of the death of any subscriber within twelve months after its execution ? see *Price v. Hathaway*, 6 Madd. 304 ; 2 De G. & S. 116 ; and see, as to the attestation, *Doe v. Monro*, 12 Mee. & W. 845 ; as to the effect of non-enrolment, see *Att.-Gen. v. Ward*, 6 Ha. 477, 482 ; assurances

to a charity of land already in mortmain do not seem to require enrolment, *Att.-Gen. v. Glyn*, 12 Sim. 84 ; *Walker v. Richardson*, 2 Mee. & W. 882.

(*l*) 3 & 4 Will. IV. c. 74, s. 41.

(*m*) *Cattell v. Corrall*, 4 Y. & C. 228.

(*n*) See sects. 38 and 74.

(*o*) 3 & 4 Will. IV. c. 74, ss. 42 and 46.

(*p*) Sect. 50.

Chap. XIII.

and enrol-
ments ne-
cessary.

within six calendar months after execution, be entered on the Court Rolls of the Manor (*q*) ; the consent of the protector (if any) may be given by deed, (whether the estate be legal or equitable,) or personally to the person taking the surrender (in those cases where the tenant in tail surrenders) (*r*).

Consent of
Protector
to barring
entail in
copyholds.

If the tenant in tail convey by surrender, and the protector consent by deed, such deed must be executed and produced to the Lord of the Manor, his Steward, or Steward's deputy, at or previous to the surrender ; and he is to indorse thereon an acknowledgment (which is made *primâ facie* evidence of the fact) of the deed having been so produced ; and is to enter the deed and indorsement on the Court Rolls ; and then to indorse a memorandum of such entry upon the deed (*s*).

If the consent of the protector be not given by deed, it must be given to the person taking the surrender by the tenant in tail : and evidence of such consent is to be preserved on the Court Roll, in manner provided in the 52nd section of the Act.

Must be by
deed if
equitable
Tenant in
Tail dis-
entail by
deed.

Where the equitable tenant in tail himself assures by deed, the consent of the protector must be given by deed ; and if given by a deed distinct from the principal assurance such deed must be executed on or before the day of the execution of such assurance by the tenant in tail ; and must be entered on the Court Rolls (*t*) : and an assurance by deed, by an equitable tenant in tail, is to be void against any person claiming for valuable consideration

(*q*) See sect. 53.

(*r*) See sects. 51, 52.

(*s*) Sect. 51.

(*t*) The Act does not say that the deed of consent must be entered on the Court Rolls at or before the time when the principal assurance is so

entered ; but such, it is conceived, is the intention, and it would be at least prudent so to enter it. The 53rd section of the Act does not seem to apply to customary freeholds ; *Reg. v. Lord of the Manor of Ingleton*, 8 Dowl. P. C. 693.

under any subsequent assurance,—(which would include a surrender,)—duly entered on the Court Rolls before the entry thereon of such deed of assurance (*u*).

We have already referred (*w*) to the necessity for the acknowledgment of conveyances by married women; and to the extended power conferred upon them by a recent statute (*x*).

By the 89th section of the 4 & 5 Vict. c. 35, it is enacted “that after the 31st day of December, 1841, every Surrender and Deed of Surrender which the Lord shall be compellable to accept or shall accept, and also every Will and Codicil a Copy of which respectively shall be delivered to the Lord of the Manor by which the Lands affected by such Surrender, Deed of Surrender, Will and Codicil are parcel, or to his Steward, or the Deputy of such Steward, either at any Court holden for such Manor at which there shall not be any Homage assembled, or out of Court, and also every Grant and Admission by the Lord of any Manor, or his Steward, or the Deputy of such Steward, pursuant to this Act, shall be forthwith entered on the Court Rolls of the Manor by such Lord, or Steward, or Deputy; and every Entry made on the Court Rolls of any Manor pursuant to this present Clause shall for all Purposes whatsoever be deemed and taken to be an Entry made in pursuance of a Presentment made at a Court holden for such Manor by the Homage assembled thereat; and the Steward, or his Deputy, shall be entitled to the same Fees and other Charges for making such Entry on the Court Rolls as he would have been entitled to in respect of such Entry in case the same had been made in pursuance of a Present-

Chap. XIII.

Acknowledgment by married women filing certificate.

Statutory provisions for immediate entry on Court Rolls of Copyhold assurances.

(*u*) Sect. 53. Sir Edward Sugden considers it probable that notice would not be held in Equity to supply the want of entry on the Court Rolls;

V. and P. 597.

(*w*) *Supra*, p. 267, *et seq.*

(*x*) 8 & 9 Vict. c. 106.

Chap. XIII. ment made at a Court holden for such Manor by the Homage assembled thereat."

Conveyance of contingent interest in copyholds under late Act.

The 6th section of the 8 & 9 Vict. c. 106, appears to extend to contingent interests in copyholds (which previously to the passing of that Act were incapable of alienation) (*y*); and it is of course desirable, although not essential, that the deed of disposition should be entered upon the Court Rolls.

Assurance of copyholds taken under the Lands Clauses Consolidation Act, 1845, to be entered on the Court Rolls.

Where lands of copyhold or customary tenure are taken under the Lands Clauses Consolidation Act, 1845, the conveyance is to be entered by the Steward of the Manor upon the Court Rolls; and upon payment to him of such fees as would be due to him on the surrender of the same lands to the use of a purchaser, he is bound to make such enrolment; and the conveyance, when so enrolled, is to have the effect in respect of such lands as if the same were of freehold tenure (*z*); but, until the same are enfranchised (*a*), they are to continue subject to the accustomed fines, rents, heriots, and services. It has been held that, under this provision, the Steward cannot claim the fee which would be due to him on the *admittance* of a purchaser (*b*).

Expediency (if land not in Register County) of indorsing notice of the conveyance on leading title deed if remaining with the vendor.

Where the estate is not situate in a Register County, and the title deeds are retained by the Vendor, it is prudent to indorse a memorandum of the conveyance upon the leading document of title; that is upon the document which he would have to produce in proof of his title were he to attempt to make any disposition of the estate inconsistent with the rights of the purchaser.

(*y*) Scriven on Copyholds, 135.
As to the purchaser's power of compelling admittance by *mandamus*, see *ibid.* 525; admittance may now be granted out of Court and out of the manor, 4 & 5 Vict. c. 35, s. 88.

(*z*) Sect. 95.
(*a*) See sects. 95, 96.
(*b*) *Cooper v. Norfolk Railway Company*, 3 Exch. 546; 6 Rail. Ca. 94.

Such a memorandum need only specify the date of, and parties to, the conveyance, and particularize the property comprised in it; it is, of course, important to the vendor, that this should be expressed in definite terms; for, if the memorandum were so worded as to leave any doubt as to the precise amount of property comprised in the conveyance, the production of such conveyance would be necessary upon any future dealing with the residue of the estate.

Chap. XIII.

Form of notice.

And, as we have already seen, upon the completion of the purchase of an equitable interest in real estate, it is prudent to give notice of the transaction to the owners of the legal estate; but, as a general rule, a purchaser's priority is not affected by his giving or omitting to give such notice (*c*); however, upon the purchase of an equity of redemption, such notice to the mortgagee who has the legal estate is material, inasmuch as any further advances which he may make to the mortgagor upon the security of the equity of redemption, in ignorance of the sale, will be valid as against the purchaser (*d*); but the mortgagee could not so tack a judgment debt (*e*).

Propriety of giving notice to Trustees on purchase of equitable interest.

Importance of notice to mortgagee on purchase of equity of redemption.

(8.) *As to the stamps.*

It is also necessary that the conveyance should be duly stamped: the want of a proper stamp, does not, however, affect its validity, but merely renders it inadmissible in evidence (*f*).

Stamps; deed not evidence without.

A deed not stamped, or insufficiently stamped, at the time of execution, might, until recently, be stamped at any subsequent period upon payment of the duty and a

Deed may be stamped after execution—penalty.

(*c*) *Supra*, p. 229.

(*e*) *Simmons v. Pettit*, 8 Jur. 209;

(*d*) *Goddard v. Complin*, 1 Ch. Ca. 119; *Blackston v. Moreland*, 2 Ch. Ca. 20; *Wrightson v. Hudson*, 2 Eq. Ca. Abr. 609, pl. 7.

and see *Whitworth v. Gaugain*, Cr. & Ph. 325.

(*f*) *Tilsley on Stamps*, 1st ed. 308.

Chap. XIII.

penalty (*g*) ; and, if brought to be stamped within twelve months after execution, the commissioners were empowered to remit all or any part of the penalty (*h*) ; but after the expiration of that time they had no such discretion (*i*) : under the late Act (*k*) a deed may still be stamped after execution on payment of a penalty of 10*l.* and the unpaid duty, and if such duty exceed 10*l.*, then, by way of further penalty, interest at 5*l. per cent.* on its amount, calculated from the first execution of the instrument ; but the sum payable for interest is not to exceed the amount of such unpaid duty ; payment of the penalty, duty, and interest is to be denoted by an appropriate stamp ; and the Commissioners retain the power of remitting the penalty within twelve calendar months after the execution of the deed.

Ad valorem
duty—
amount of,
depends
solely on
consider-
ation stated.

As we have already seen (*l*), the amount of *ad valorem* duty is determined solely by the consideration appearing on the face of the conveyance ; and a misstatement of the consideration neither avoids the deed nor affects its admissibility in evidence (*m*) ; although it may be made the subject of severe penalties, and, where the full purchase or consideration money is not truly stated, the purchaser, or his representatives, may recover from the vendor or his representatives so much of it as is not so stated (*n*).

Is payable,
on what
consider-
ation.

The *ad valorem* duty is payable in respect of any money consideration (*o*) directly or indirectly paid or secured or agreed to be paid, or of a debt due to the purchaser and charged on the property, (which would include a registered

(*g*) 37 Geo. III. c. 136, s. 2.

(*h*) 44 Geo. III. c. 98, s. 24.

(*i*) Tilsley, 304.

(*k*) 13 & 14 Vict. c. 97, s. 12.

Mr. Tilsley states that these provisions apply to instruments executed before the passing of the Act (see Tilsley's New Stamp Act, 6) ; but this seems to be at least doubtful ;

see 14 Jur. pt. 2, 382.

(*l*) *Supra*, p. 254.

(*m*) Tilsley, 250.

(*n*) *Vide supra*, p. 254 ; 48 Geo. III. c. 149, s. 24 ; *Gingell v. Purkins*, 19 L. J., N. S., Exch. 129.

(*o*) And as to stock, securities, &c. under the new Act, *vide supra*, p. 256.

judgment debt), or of a debt due to any other person or other sum of money which will remain a charge upon the property in the hands of the purchaser (*p*) ; a conveyance in discharge of a *bond fide* existing debt not charged upon the property hardly seems to come within the provisions of the Acts, but in practice it is usual in such a case to affix the *ad valorem* stamp (*q*) : where timber, fixtures, or any other parts of the inheritance, are valued separately, the amount of valuation must be stated as part of the consideration ; and the duty is payable upon all moneys which are agreed to be paid in all events and whose amount can be ascertained, although the payments may be deferred, and may in part take the name of interest ; for instance, where the consideration is the payment of an annuity for an absolute term of years, the duty is (it is conceived) payable on the gross amount of the several payments (*r*) ; so, where the consideration is the grant of an annuity commencing from a day prior to the date of the conveyance, *ad valorem* duty must, it is conceived, be paid upon a proportionate part of the annuity up to the date of the conveyance ; so, where the purchase-money is made payable by instalments, with interest upon the balance from time to time up to the dates of the several instalments, the duty is payable as well upon such interest as upon the principal (*s*).

On valuation of timber, fixtures, &c.

On all moneys absolutely agreed to be paid although payable in future, or described as interest.

But where the amount is incapable of being ascertained, (as where the consideration is a life annuity (*t*),) no *ad valorem* duty would seem to be payable ; and the same was until recently the case when the consideration consisted of

But not on life annuity, or stock transferred.

(*p*) See 43 Geo. III. c. 149, s. 22, and 55 Geo. III. c. 184, schedule, tit. Conveyance.

(*q*) And see *Gingell v. Purkins*, 19 L. J., N. S., Exch. 129.

(*r*) See, and consider, *Chillingworth v. Chillingworth*, 8 Sim. 404.

(*s*) See, and consider, *Beete v. Bidgood*, 7 B. & C. 453 ; see *Lord Hatherton v. Bradburne*, 13 Sim. 599 ; and see now the Schedule to 13 & 14 Vict. c. 97, tit. Conveyance.

(*t*) *Blandy v. Herbert*, 9 B. & C. 396.

Chap. XIII. stock ; but this, as we have seen (*u*), has been altered by the late Act.

Purchase-money may after contract be reduced to lessen duty.

And the vendor might and may, if he please, *bonâ fide* accept a less sum than the amount originally agreed to be paid, although the reduction be little more than nominal, and the sole object be to avoid a higher duty (*w*).

Duty not payable on money paid as part of family arrangement.

And no duty is payable in respect of a sum not paid to, or for the benefit of, the person who conveys, or directs the conveyance of, the estate (*x*) ; but paid to, or settled upon, other parties, as part of a family arrangement (*y*).

Is payable on money paid by Lessee to party holding agreement for Lease.

It has recently been decided, that where a person having an agreement for a lease sells his interest, and procures the lessor to grant the lease direct to the purchaser, and himself joins in the lease as a directing party, the purchase-money is liable to duty, and must be set forth as the consideration on the face of the lease (*z*).

Duties payable under 13 & 14 Vict. c. 97.

The following scale of duties is payable under the late Act (*a*) ; viz., where the purchase-money does not exceed 25*l.*, a duty of 2*s.* 6*d.* ; where it exceeds 25*l.* and does not exceed 300*l.*, a duty of 2*s.* 6*d.* for every entire sum of 25*l.* and for any fractional part of such sum ; where it exceeds 300*l.* and does not exceed 600*l.*, a duty of 5*s.* for every entire sum of 50*l.* and for any fractional part of such sum ; and where it exceeds 600*l.*, a duty of 10*s.* for every entire sum of 100*l.* and for any fractional part of such sum : and by the same Act the lease for a year stamp, and

(*u*) *Supra*, p. 256.

(*w*) *Shepherd v. Hall*, 3 Camp. 180 ; Sng. 698 ; Tilsley, 253.

(*x*) 4 B. & C. 246 ; and, as to general exemptions from stamp duty, see Tilsley, 759, *et seq.*

(*y*) *Denn d. Manifold v. Diamond*, 4 B. & C. 243 ; *Massy v. Nanney*, 3 Bing. N. C. 478 ; and, *In re Kerrey Glazier*, cited in Tilsley, 246.

(*z*) *Att.-Gen. v. Brown*, 3 Exch.

662 ; see indemnity clause, 13 & 14 Vict. c. 97, s. 10, in respect of penalties incurred under this doctrine, prior to 20th March, 1850.

(*a*) According to Mr. Tilsley, the old scale of duties is payable on deeds executed before, although not stamped until on or after, the 11th October, 1850 (Tilsley's New Stamp Act, 3), *sed qu.* ; see 14 Jur. part 2, 332.

the corresponding additional duty payable on a feoffment or bargain and sale are abolished (*b*) ; and instead of the old progressive duty, every entire number of 1080 words after the first 1080 words is charged with the amount of the *ad valorem* duty (if not exceeding 10s.), or, if such *ad valorem* duty exceed 10s., or if the deed be not liable to *ad valorem* duty, then with a progressive duty of 10s.

And the Act empowers the Commissioners, on payment of a fee of 10s., to state what in their opinion is the proper amount of duty ; and if the same has already been or is then paid, to stamp the deed with a stamp denoting, and which is to be evidence, that the full amount of duty has been paid ; and an appeal from their decision lies to the Court of Exchequer (*c*).

Chap. XIII.
Commissioner may determine the proper amount of duty.

And (*d*) where any lands or other property shall have been actually and *boná fide* contracted to be sold prior to the 20th March, 1850, by any contract or agreement in writing duly stamped, or shall have been actually and *boná fide* sold under the decree of any Court made prior to the said 20th March, and shall be conveyed to the purchaser or any other person by his direction after the 10th October (*e*) and before or on the 31st March, 1851, the conveyance is to be exempt from any *ad valorem* duty of a greater amount than would have been payable under the old law ; but the grounds of exemption are to be proved to the satisfaction of the Commissioners, and a certificate of the matter so proved is to be written on the deed, and signed by them, some or one of them.

Certain conveyances exempted from increase of duty.

Where the conveyances to several joint-purchasers are comprised in the same deed, duty is payable upon the aggregate of the several purchase-moneys (*f*).

What duty payable on single conveyance to joint purchasers.

(*b*) Sects. 6 and 7.

omitted.

(*c*) Sects. 14 and 15.

(*f*) See 1st Schedule to 55 Geo.

(*d*) Sect. 16.

III. c. 184, tit. Conveyance.

(*e*) 1850 seems to be accidentally

Chap. XIII.

In case of
sub-sales—
sub-pur-
chasers
alone con-
sidered the
purchasers.

Upon a sub-sale by a purchaser who has not obtained a conveyance, such purchaser and his sub-purchasers are considered the vendor and purchasers within the meaning of the Stamp Acts; and the duty payable upon the conveyances to the sub-purchasers (although the original vendor join therein) is determined solely by the amount paid by such sub-purchasers; and if the original vendor do not join in the conveyance to the sub-purchasers, and the same is duly stamped, no *ad valorem* duty is payable upon any subsequent conveyance by him of the legal estate (*g*).

On single
conveyance
of separate
estates to
sole pur-
chaser.

And where a purchaser takes, by the same deed, conveyances, from several vendors, of properties separately contracted for, duty is payable upon the aggregate of the purchase-moneys (*h*).

None on
deed of con-
firmation.

A deed executed by way of confirmation of a previous deed purporting to be a conveyance and which has paid the *ad valorem* duty, is not itself liable to such duty, although the former deed was inoperative (*i*).

Is payable
on the
principal
assurance.

Where there are several assurances, the *ad valorem* duty is payable on the principal assurance; and what is to be deemed such in certain specified cases is defined by the Acts: and where in any other case it is doubtful which assurance shall be considered the principal, the parties may determine for themselves which is to be so considered; and the other instruments may (if required) be impressed with stamps denoting payment of the duty (*k*).

Denoting
Stamp.

Copies of
Court Roll
procured to
be stamped
by Steward
of Manor.

Upon the sale of copyholds, the Steward must, within four calendar months after the date of any surrender or admittance, deliver out the usual copy of Court Roll duly stamped; but he may insist on payment of his fees and the

(*g*) See note (*f*).

(*h*) *Ibid*.

(*i*) *Doe d. Priest v. Weston*, 2

Q. B. 249.

(*k*) See note (*f*).

stamp duty before accepting the surrender or granting the admittance (*l*).

Chap. XIII.

Where persons having separate estates or interests in the property join in the conveyance, only one set of stamps is necessary (*m*): however, in a recent case (*n*), where five tenants in common of copyholds contracted to sell at an entire price, the Court of Queen's Bench determined that, although only one stamp was payable upon the surrender, the purchaser must be admitted separately to each of the five estates in common, and that a separate stamp was payable for each admittance.

Conveyance by several owners, what stamps are necessary.

And it is provided, by the 55 Geo. III. c. 184 (*o*), that "where any deed or instrument operating as a conveyance shall operate also as a conveyance of any other than the property sold, by way of settlement or for any other purpose, or shall also contain any other matter or thing besides what shall be incident to the sale and conveyance of the property or relate to the title thereto, the same shall be charged with such further duty as any separate deed containing the other matter would have been chargeable with, exclusive of the progressive duty."

Further duty when deed has a double operation.

Thus, where the conveyance operates also as a mortgage, the double duty is payable; however, in a very recent case (*p*), where a purchaser of a copyhold estate from parties entitled thereto as equitable tenants in common, agreed with a third party for a loan upon a mortgage of the estate in order to enable him to complete the purchase, and the conveyance and mortgage were effected by the vendors surrendering the estate to the use of the mortgagee, and subject thereto to the use of the pur-

As on a conveyance and mortgage.

(*l*) 48 Geo. III. c. 149, ss. 33 and 34.

(*m*) Sug. 698.

(*n*) *The Queen v. Eton College*, 8 Q. B. 526.

(*o*) See Schedule, tit. Conveyance; see, too, Schedule to 13 & 14 Vict. c. 97, tit. Settlement.

(*p*) *Rushbrook v. Hood*, 5 C. B. 131; 11 Jur. 931.

Chap. XIII. chaser, (which surrenders, it is presumed, bore the proper *ad valorem* stamps,) a cotemporary deed, by which the vendors to the extent of their respective shares entered into covenants for title with the purchaser and also separately with the mortgagee, and which contained the usual covenant by the purchaser with the mortgagee for payment of principal and interest, and to insure against fire, and a power of sale, was held to be sufficiently stamped with a single deed stamp and followers; the case, of course, was not within the above clause of the 55 Geo. III., but it was contended that it was a multifarious deed, and fell within the general provisions of the 12 Anne, sess. 2, c. 9, s. 24 (*q*); but a contrary doctrine was laid down very broadly by the Court (*r*).

But on a conveyance to uses directed by purchaser.

Sir *E. Sugden* (citing Mr. *Coventry*) remarks that the clause above cited from the 55 Geo. III. c. 184, "does not seem to affect a conveyance of the property sold to such uses as the purchaser may choose to direct" (*s*).

Matters which do not involve additional duty.

And a covenant to produce title deeds, or an assignment of a term in trust to attend, does not involve the payment of additional duty (*t*); nor is it payable in respect of an agreement for a lease of the property to the vendor being included in the conveyance, such agreement being considered as forming part of the contract (*u*).

Deed stamp unnecessary although *ad valorem* duty under 1*l.* 1*5s.*

And a deed stamp is not necessary by reason of the *ad valorem* duty being less than the amount of a deed stamp (*w*).

Indorsed receipts, &c., count as part of deed.

In counting a deed for the purpose of ascertaining the amount of progressive duty, the schedules (if any), and indorsed receipt, and indorsed attestation (*x*), are included;

(*q*) See *Tilsley*, 357.

(*r*) 11 Jur. 932; see the observations of Maule, J., and Wilde, C. J.

(*s*) Sug. 699.

(*t*) Sug. 699; *Wolseley v. Cox*, 2

Ad. & El., N. S., 321.

(*u*) *Doe v. Phillips*, 11 Ad. & El. 796.

(*w*) Sug. 700.

(*x*) Sug. 699.

as are also the words and figures contained in any indorsed or annexed map or plan referred to in the deed; but not of a plan neither indorsed nor annexed but only referred to (*y*): and it is by the late Act declared (*z*), retrospectively and prospectively, that progressive duty does not attach in respect of the contents of any deed or instrument liable to stamp duty and duly stamped, and which may be or may have been put or indorsed upon or annexed to the principal instrument, or in any manner incorporated with or referred to in or by the same.

An instrument bearing stamps of sufficient amount but improper denominations, is sufficiently stamped unless they have been specially appropriated to some other description of instrument (*a*); under this provision the lease for a year stamp upon a conveyance or mortgage may often be applied to make good a deficiency in the progressive duty, upon the ground of the freehold having been in reversion, by reason either of an outstanding term for years or of a subsisting tenancy.

Stamps of adequate amount, but improper denomination, when sufficient.

We have seen (*b*) that, in the absence of evidence to the contrary, the Courts will presume that a conveyance which was duly executed was also duly stamped.

Presumption in favour of instruments having been stamped.

As to whether fresh stamps become necessary by reason of alterations in the instrument, the general rule appears to be (*c*), "that where by reason of an alteration made in it, an instrument becomes a new one, a fresh stamp is requisite," but not in any other case: it has been held that where the only conveying party to a marriage settlement had executed it, and then, upon the objection of other parties, a clause was struck out, and the deed was re-executed by the conveying party, the execution was only

Fresh stamps not necessary if instrument altered while *in fieri*.

(*y*) 1 Jarm. Conv. by S. 726.

(*b*) *Supra*, p. 161.

(*z*) 13 & 14 Vict. c. 97, s. 11.

(*c*) See Tilsley, 366.

(*a*) See 55 Geo. III. c. 184, s. 10.

Chap. XIII. *in fieri*, and no new stamp was necessary (*d*) ; and it appears that, where only some of the parties to a deed have executed it, the filling up of blanks, or even making alterations which solely affect the interests of the parties who have not executed, will not involve the payment of additional duty (*e*) : but this would not extend to a substitution of the name of a sub-purchaser, in place of that of the original purchaser, after the conveyance had been executed by the vendor (*f*).

(9.) *As to the costs.*

Costs of conveyance are borne by purchaser: of execution by vendor.

The purchaser (in the absence of any express agreement) prepares, and pays for the preparation of, his conveyance (*g*) ; but the costs of perusal and execution by all necessary conveying parties fall on the vendor (*h*) ; including, it is conceived, the costs of all matters essential to the validity of the deed as a perfect conveyance ; *e.g.*, the acknowledgment by married women and the filing of the certificate of acknowledgment, and the enrolment of a disentailing deed and deed of consent by the protector upon a sale by a tenant in tail ; but a purchaser always pays for the registration of his conveyance, as an unregistered deed is valid except as against adverse claimants under a registered instrument.

Where a testator having devised an estate in strict settlement contracted to sell part and died before conveyance, the costs of the necessary suit for obtaining a conveyance under the 1 Will. IV. c. 60, s. 17, were directed to be paid out of the vendor's estate (*i*) ; so where a vendor

(*d*) *Jones v. Jones*, 1 Cro. & M. Gr. 674.
721. (g) Sug. 692.

(*e*) See Tilsley, 374, and cases (h) *Ibid.*
cited.

(i) *Farrar v. Earl of Winterton*,
4 Y. & C. 472.

(f) *London and Brighton Railway Company v. Fairclough*, 2 Man. &

died intestate before conveyance leaving an infant heir, the costs of the necessary suit, and of the conveyance being settled by the Master, were ordered by Sir *L. Shadwell*, V. C., to be paid out of the purchase-money (*k*) ; but in a later case, where the death occurred within two months after the contract, V. C. *Knight Bruce* refused to give costs, and suggested that there must have been some default on the part of the vendor in the case last referred to (*l*) : but where at the date of the contract the legal estate is in an infant the expenses of having the conveyance settled by the Master must be borne by the vendor, although the purchaser bought with notice of the state of the title (*m*).

A purchaser of copyholds pays the fine on admittance, and the Steward's fees both on the surrender and admittance (*n*) ; but, of course, the vendor pays the private expenses of both himself and the other necessary parties to the surrender ; an agreement to surrender and assure the estate at his own costs and charges will not render him liable to the fine payable upon admittance (*o*).

Purchaser of copyholds pays for surrender and admittance ;

And if the vendor must himself be admitted and pay a fine before surrendering, he of course bears these additional expenses (*p*).

but vendor pays for his own admittance if necessary.

Where an allotment under an Inclosure Act had been made generally in respect of the landowner's several copyhold tenements, and the custom of the manor was to pay the same fee on admission to part as on admission to the whole of a tenement, the Steward upon the subsequent admittance of a purchaser to part of the allotment was

Steward's fees on admittance to an allotment held under several titles.

(*k*) *Midland Counties Railway Company v. Westcomb*, 11 Sim. 57.

(*l*) *Hanson v. Lake*, 2 Y. & C. C. 328.

(*m*) *Browne v. Lake*, 15 L. J., N. S., Ch. 34.

(*n*) *Drury v. Man*, 1 Atk. 95, n., Saunders' ed. ; Scriven on Copyholds, 317.

(*o*) *Graham v. Sime*, 1 East, 632.

(*p*) See *Drury v. Man*, 1 Atk. 95, n., Saunders' ed.

Chap. XIII. held to be entitled to as many fees as the allottee had tenements at the time of the Inclosure (*q*).

Costs of lease.

Of conveyance in consideration of rent-charge.

Upon the grant of a lease the well-known practice is, for the lessor's solicitor to prepare the lease, and for the lessee to pay both his own and the lessor's expenses; where land is sold in consideration of a rent-charge the assurance partakes of the natures of a conveyance and a lease; upon this ground it is suggested in a work of considerable reputation (*r*) that the costs should be equally divided between the parties; if the vendor require a counterpart of the deed, he may, it is conceived, be fairly asked to pay for the counterpart, but (with this exception) it seems difficult to understand why the circumstance of his sustaining a mixed character of vendor and lessor should be a reason for his paying a proportion of costs which neither vendor nor lessor singly is ever liable to pay.

Purchasers pay vendors' costs on sale under Lands Clauses Act,

Upon a sale under the Lands Clauses Consolidation Act, 1845 (*s*), the purchasers must pay to the vendors all their costs of the conveyance and the costs of making out and proving their title (*t*); such costs (if the parties differ) to be taxed by the Master; the vendors have no lien for the amount of such costs upon moneys deposited under the 85th section of the Act (*u*), and it seems doubtful whether, under the provisions of the above section or of the 80th section, the vendors can recover their costs of or prior to the contract (*w*).

(*q*) *Evans v. Upsher*, 16 Mee. & W. 675.

(*r*) Jarm. Conv. by S. 518.

(*s*) See sects. 82 and 83.

(*t*) Costs of the "contracts, sales, and conveyances," held, under a private act, to include costs of making out the title; *In re London and Greenwich Railway Company*, 3 Ha. 22.

(*u*) *In re London and South West-*

ern Railway Company, 16 Sim. 165; *Ex parte Great Northern Railway Company*, 16 Sim. 171.

(*w*) See, however, *Ex parte Stevens*, 12 Jur. 238; as to whether these costs include the costs of getting the legal estate out of the infant heir or devisees of the vendor, see *Midland Counties Railway Company v. Westcomb*, 11 Sim. 57; *Hanson v. Lake*, 2 Y. & C. C. C. 328; *Eastern*

The purchasers from mere statutory owners under the above Act are also liable to pay the costs of the purchase or taking of the lands, or which shall have been incurred in consequence thereof (*x*), other than such costs as are otherwise provided for by the Act, and the costs of the interim and permanent investment (*y*) of the moneys deposited (*z*), and of the necessary applications to the Court for such investment, and for payment of the income, and for payment out of Court of the principal (upon any person becoming absolutely entitled thereto) (*a*); but those cases are excepted where the moneys are so deposited by reason of the wilful refusal of the party entitled thereto to receive the same, or to convey or release the lands, or by reason of the wilful neglect of any party to make out a good title to the land required (*b*); nor does the liability extend to such

Chap. XIII.

and costs of re-investing purchase-money, and for payment of it out of Court.

Counties Railway Company v. Tuffnell, 3 Rail. Ca. 133; as to payment, out of the fund in Court, of such costs as the purchasers under a private act are not liable to pay, see *Ex parte Pasmore*, *Ex parte Longfield*, and *Ex parte Tourgood*; *Re London Bridge Acts*, 1 Y. & C. Ex. 75, 79, and 588; and see *In re The Bishop of Salisbury*, 16 L. T. 122.

(*x*) Sect. 80. This has been held to include the costs of a reference in lunacy as to the propriety of the sale; *In re Taylor*, 1 Mac. & G. 210; and to have a retrospective effect, where old companies are amalgamated under an Act embodying the general Act: *Ex parte Eton College*, 16 L. T. 121.

(*y*) Including the broker's commission on the purchase of stock for interim investment; *Ex parte Corporation of Trinity House*, 3 Ha. 95; costs of interim investment are not given against the company under private acts, which contain no express provision on the subject; *Ex parte Cooke*, 7 Jur. 639, V. C. E.; *Ex*

parte Crober, 13 Jur. 481, V. C. E.

(*z*) See 69th and 80th sections of the Act: "wilful" refusal or neglect means, that which arises from mere will or caprice, and not from an exercise of reason: *Ex parte Bradshaw*, 16 Sim. 174; see, however, *Elliott v. Turner*, 13 Sim. 477, 485. Where a private act omitted to provide for the costs consequent on payment of the money into Court by reason of the title being doubtful, the Court refused to throw such costs on a public body purchasing under the Act: *Ex parte Angell*; *Re Trinity House Lighthouse Act*, 4 Y. & C. 496.

(*a*) See, as to the costs of such applications under private acts, *Ex parte Marshall*, 1 Ph. 560; *Ex parte Molynaux*, 2 Coll. 273, and cases there cited; *Ex parte Gore Langton*, 11 Jur. 686; *Ex parte Thoroton*, 12 Jur. 130; *Ex parte Crober*, 13 Jur. 481; *Ex parte Stater's Devisees*, 5 Rail. Ca. 700; *Ex parte the Rector of Loughton*, 14 Jur. 102.

(*b*) See note (*z*).

Chap. XIII.

costs as are occasioned by litigation between adverse claimants (c). The costs of applying the money in paying off incumbrances affecting other parts of the settled estates do not appear to be provided for by the Act (d). Where the money deposited by a Railway Company, amounting to 644*l.*, was applied (together with other money, making in the whole 1000*l.*) in the purchase of lands, the Company were still held liable to pay all the costs (e); this decision, however, seems open to remark; as observed by the Company's Counsel, "This is not the expenditure of a few pounds more; but here is an expenditure of a much larger sum for the benefit of the Vicar. Where is the Court to stop? Would it make us pay the expense of a purchase for 10,000*l.*?" (f): and in a later case *Sir James Knight Bruce*, V. C., under similar circumstances, in ordering the Company to pay the costs, directed that the same should not be increased by reason of the purchase-money exceeding the amount in Court (g). Of course the Act only provides for such costs of re-investment as, in the absence of agreement, would strictly fall upon the statutory vendors as between themselves and the parties from whom they buy for the purpose of re-investment (h); and, except under special circumstances, under the Lands Clauses Consolidation Act, 1845, only the costs of one re-

What limit
to liability.

(c) Sect. 80; see *Ex parte Palmer*, 13 Jur. 781; and *Hore v. Smith*, 14 Jur. 55; *Ex parte Smith*, 6 Rail. Ca. 150; S. C., 19 L. J., N. S., Ch. 56.

(d) See, upon similar clauses in private acts, *Ex parte the Earl of Hardwicke*, 12 Jur. 508; *In re Yeates*, 12 Jur. 279; *Ex parte Trafford*, 2 Y. & C. Ex. 522; *Ex parte Northwick*, 1 Y. & C. Ex. 166.

(e) See *Ex parte Hodge*, 16 Sim. 159; *Ex parte Lord Palmerston*, 4 Rail. Ca. 57, n.

(f) And see *Ex parte Tetley*, 4 Rail. Ca. 55; see, also, *Ex parte Newton*, 4 Y. & C. 518, where extra costs occasioned by the peculiarity of the contract, and which were not considered payable by the company, were directed to be paid out of the fund in Court.

(g) *Re Branmer's Estate*, 14 Jur. 236.

(h) *Jones v. Lewis*, 1 De G. & S. 245, and 11 Jur. 511; and see *Ex parte Middle Clayton Trust*, 16 L. T. 123.

investment in land are allowed; although the general rule seems to be different under the older Acts (*i*). Chap. XIII.

But general expressions referring to costs to be incurred in consequence of the sale, or the proposal for the sale, or the taking of the land, whether occurring in an Act of Parliament or a private agreement (*k*), will not throw upon the purchasers the costs of re-investment.

General expressions not sufficient to throw costs of re-investment on purchasers.

The purchaser, it appears, may generally (*l*), although not universally (*m*), require the vendor to get in, at his own expense, outstanding estates or incumbrances, by deeds distinct from the conveyance; or, if that course be not adopted, he may at least require him to bear the increased expense occasioned by the concurrence of trustees and incumbrancers in the conveyance. When an estate was subject to incumbrances, which, to save expense, were got in by separate deeds, and paid off out of the purchase-money, the Court considered that the purchaser should have insisted upon the vendor preparing the deeds, and furnishing an abstract of them, (delaying the execution of them, it is presumed, until such abstract was approved and the engrossed deeds themselves were examined by the purchaser); and that the latter, having laid the drafts of these deeds

Vendor bears additional expenses when estate is incumbered, &c.

(*i*) See *Ex parte Boxmoor Trustees*, 3 Rail. Ca. 513; *In re St. Katherine Dock Company*, *ibid.* 514; *In re Merchant Tailors' Company and London Bridge Act*, 10 Beav. 485, where the costs of a fourth and last re-investment were allowed, the balance sought to be invested being only 63*l.*: *Ex parte the Rector of Loughton*, 14 Jur. 102, where the amount of the second investment was only 6*l.*, part of a balance of 20*l.* 9*s.* 5*d.*, and the Court directed the balance to be paid to the purchaser, and fixed the company with the costs: and see *Jones v. Lewis*, 2 Mac. & G. 163,

where it was held (reversing the decision of V.C.K.B.) that the vendors were entitled to an unlimited number of re-investments, unless made vexatiously, or in an unreasonable exercise of the direction to invest: and the reasoning of the Court would seem to apply to cases within the Lands Clauses Act.

(*k*) See *In re London Bridge Acts*, 13 Sim. 180.

(*l*) Sug. 690; *Jones v. Lewis*, 1 De G. & S. 245; 11 Jur. 511.

(*m*) *Reeves v. Gill*, 1 Beav. 375; and see note to 9 Jarm. Conv. by S. 30.

Chap. XIII.

before Counsel to peruse and settle on his behalf, could not throw the expenses upon parties who were liable to pay his costs properly incurred (*n*).

But not if purchaser keep incumbrances on foot as a protection.

If, however, a purchaser keep incumbrances on foot for his own protection, he cannot, it is conceived, throw upon the vendor the costs of the necessary assignment, whether the same be effected by the principal conveyance or by a collateral deed.

If a solicitor, without special instructions, prepare the conveyance during the existence of a known impediment to completion upon which the matter eventually goes off, he cannot claim the costs of the conveyance (*o*).

Taxation of conveyancing costs under 6 & 7 Vict. c. 73.

And we may here refer to the 6 & 7 Vict. c. 73, by which a solicitor's bill of costs, although composed entirely of conveyancing charges, may be referred for taxation upon petition presented either to the Lord Chancellor or the Master of the Rolls; the order upon a petition presented within twelve months after delivery but before payment of the bill is of course (*p*); although part of the items be covered by a special agreement (*q*), or although the application be made by a third party liable to pay (*r*); and may be made by the Vice-Chancellor (*s*). Under special circumstances (*t*), the bill may be referred at any time within, but not after, twelve months after payment (*v*): such special circumstances are usually pres-

(*n*) *Jones v. Lewis*, *ubi supra*.

(*o*) *Potts v. Dutton*, 8 Beav. 493.

(*p*) See *In re Gaitskell*, 1 Phil. 576; and *In re Pender*, 2 Phil. 73; want of signature by the solicitor is immaterial on an application by the client for taxation, *S. C.*, *ib.* 69; as to the principle on which a bill will be taxed, see *Cooper v. Ewart*, 2 Phil. 362; *In re Smith*, 9 Beav. 182.

(*q*) *In re Eyre*, 2 Phil. 367.

(*r*) *In re Bracey*, 8 Beav. 338.

(*s*) See *In re Carew*, 8 Beav. 128; *In re Howard*, *ib.* 424.

(*t*) As to which see *In re Drake*, 8 Beav. 123; *In re Wells*, *ib.* 416; *In re Bennett*, *ib.* 467; *In re Jones*, *ib.* 479; *In re Fyson*, 9 Beav. 117; *In re Colquhoun*, *ib.* 146; *In re Currie*, *ib.* 602; *In re Neate*, 10 Beav. 181; *In re Drew*, 10 Beav. 368; *In re Bagshawe*, 2 De G. & S. 205.

(*v*) See sect. 41; *In re Massey*, 8

sure, as when immediate payment is required at a time when delay in completing the business would seriously inconvenience the client (*w*); and secondly, error or overcharge in the bills. The overcharges may be such as of themselves to afford evidence of fraud, and then very slight if any evidence of pressure is necessary to induce an order for taxation (*x*); but mere overcharge, although a necessary ingredient, is in itself insufficient (*y*), even although the bill was paid under protest (*z*). Mere retention of the amount of the bill out of moneys in the hands of the solicitor does not amount to payment, unless there is also a settlement of account (*a*): nor does a settlement by way of compromise, if effected under pressure, oust the jurisdiction (*b*): the Court, however, upon a petition under the Act can only ascertain by the ordinary rules of practice the amount payable, and cannot determine whether, prior to the business being done, any special agreement existed as to the manner in which the costs were to be charged, or the mode by which the amount should be ascertained (*c*). Under the 38th section, the

Beav. 458; *Re Harper and Jones*, 10 Beav. 284, 290; but the Court under its general jurisdiction will enforce with costs a solicitor's undertaking to deliver his bill, although more than twelve months have elapsed since payment, it having been paid on the faith of such undertaking; *In re Foljambe*, 9 Beav. 402.

(*w*) See *Ex parte Wilkinson*, 2 Coll. 92; *In re Tryon*, 7 Beav. 496; see also *In re Jones*, 8 Beav. 479; *In re Harrison*, 11 Beav. 57.

(*x*) *In re Harding*, 10 Beav. 250, 252; *In re Sladden*, 10 Beav. 488; *In re Welchman*, 11 Beav. 319.

(*y*) *In re Stirke*, 11 Beav. 304; specific items of overcharge must be alleged and proved, *In re Thompson*,

8 Beav. 237.

(*z*) *In re Stirke*, *ubi supra*, and *In re Welchman*, 11 Beav. 319; *In re Harrison*, 11 Beav. 57; as to the meaning of the words "under protest," see 8 Beav. 462.

(*a*) See *In re Cattlin*, 8 Beav. 121; *In re Bignold*, 9 Beav. 270; and as to payment by a promissory note, see *Sayer v. Wagstaff*, 5 Beav. 415; *In re Currie*, 9 Beav. 602; see also *Re Harper and Jones*, 10 Beav. 284.

(*b*) *In re Stephen*, 2 Phil. 562; see *In re Whitcombe*, 8 Beav. 140.

(*c*) *In re Rhodes*, 8 Beav. 224; see 2 Ph. 575; and see *In re Thompson*, 8 Beav. 237; *In re Beale*, 11 Beav. 600.

Chap. XIII. right of referring the bill is given, not only to the immediate client, but also to any persons who, as between themselves and such client, may be liable to payment; but, in such a case, the bill must be taxed as between the solicitor and his immediate client (*d*); so that if a purchaser has agreed to pay the vendor's costs, the vendor's solicitor, upon taxation on the petition of the purchaser, will be allowed costs properly incurred as between himself and the vendor, although they may have been improperly incurred as between the vendor and the purchaser: so also, as in an ordinary case, special circumstances must be proved if the bill has been paid, although the payment were by the immediate client (*e*); and the lapse of twelve months since payment precludes taxation under the Act (*f*); and a bill cannot be taxed at the instance of a person who, under no previous liability, voluntarily pays it (*g*). A bill when delivered is *primâ facie* binding on the solicitor for the purposes of taxation, and he is not entitled, as of course, either on the one hand to reduce the demand (*h*), or, on the other, to increase the rate of charges (*i*); but he may obtain leave to carry in an additional bill of items accidentally omitted (*k*). It has been recently held that under this Act a country solicitor can procure the taxation of the charges of his town agent (*l*): but it does not authorize the taxation of the fees of the steward of a manor, (who is a solicitor,) in respect of matters in which he acts only as a steward (*m*).

(*d*) See *In re Jones*, 8 Beav. 479;
In re Fyson, 9 Beav. 117; *In re*
Bignold, 9 Beav. 269; *In re Har-*
rison, 10 Beav. 57.

(*e*) *In re Bennett*, 8 Beav. 467.

(*f*) *In re Downes*, 5 Beav. 425;

In re Massey, 8 Beav. 458.

(*g*) *Re Becke and Flower*, 5 Beav.

466.

(*h*) *In re Carven*, 8 Beav. 436.

(*i*) *S. C.*, and *In re Wells*, *ib.* 416;
In re Walters, 9 Beav. 299.

(*k*) *In re Walters*, *ubi supra*.

(*l*) *Smith v. Dimes*, 13 Jur. Exch.
 518.

(*m*) *Allen v. Aldridge*, 5 Beav.

401.

And the Court may, under its general jurisdiction, order taxation of a bill consisting wholly or in part of conveying costs, if the solicitor refuse to deliver up deeds and papers in his possession except upon payment of the bill (*n*).

Lastly, under this head, we may remark, that the 8 & 9 Vict. c. 119 (*o*), enacts that in taxing any bill for preparing and executing any deed *under that Act*, it shall be lawful for the taxing officer, and he is thereby required, in estimating the proper sum to be charged for such transaction to consider not the length of such deed, but *only* the skill and labour employed and responsibility incurred in the preparation thereof: an enactment which in principle is unexceptionable, but in theory throws a most heavy responsibility upon the Taxing Masters: it is, however, believed that their duties under the Act have practically been hitherto far from onerous.

Chap. XIII.

Taxation ordered under general jurisdiction if solicitor claim a lien on papers for his costs.

Costs of conveyance under 8 & 9 Vict. c. 119, to be taxed solely with reference to skill, labour, and responsibility.

(*n*) *In re Murray*, 1 Russ. 519; (*o*) As to which, *vide supra*, p. 247.
In re Rice, 2 Keen, 181.

AS TO THE EFFECT OF THE CONVEYANCE ON THE RELATIVE
RIGHTS OF VENDOR AND PURCHASER.

1. *Vendor's lien on estate for unpaid purchase-money.*
2. *Whether he has any remedy if estate has been sold at undervalue : or more has been conveyed than was intended.*
3. *His right of pre-emption under Lands Clauses Consolidation Act, 1845.*
4. *His remedies at Law and in Equity on purchaser's covenants.*
5. *Purchaser's remedies on vendor's covenants.*
6. *His remedy in Equity under special circumstances if title defective.*
7. *His right to pay off incumbrances out of purchase-money.*
8. *His remedy in Equity if he buy his own estate, &c ;—or if lands are omitted from conveyance—and as to further assurance in Equity and by Statute.*
9. *As to his general rights and liabilities under the conveyance.*

(1.) THE conveyance, if purporting to comprise “all the estate and interest” of a conveying party in the property, will not be restricted in its operation by the circumstance of his having concurred therein in any particular and specified character (a).

Vendor has
a lien on
estate for
unpaid

In the absence, however, of an express agreement, and of those circumstances from which the Court can imply an

(a) *Drew v. Earl of Norbury*, 3 Jo. & Lat. 267.

intention to the contrary, the vendor, notwithstanding the execution of the conveyance which contains the above expressions and acknowledges payment of the purchase-money and bears an indorsed receipt for the amount, and notwithstanding delivery of possession to the purchaser, retains an equitable lien (*b*) upon the estate, whatever may be its tenure, for all or such part of the purchase-money as in fact remains unpaid (*c*): and such lien is valid against volunteers, creditors, (whether claiming under a composition deed or in Bankruptcy) (*d*), and sub-purchasers with notice, claiming under the first purchaser (*e*): and a sub-purchaser, even without notice, is postponed unless he has the legal estate (*f*), or (in the opinion of Sir *E. Sugden*) (*g*) the deeds: it has even been held, in a recent case, that a sub-purchaser or mortgagee acquiring the legal estate, but neglecting to ask for the deeds, is to be postponed to the original vendor who holds them as a security for his unpaid purchase-money (*h*).

Chap. XIV.
purchase-money.

Lien is valid
as against
whom.

If, however, the vendor, having conveyed the estate to the purchaser, retain the title deeds, the latter can recover them at Law, notwithstanding that the purchase-money be unpaid, unless the conveyance has been executed as an escrow, to be delivered on payment of the money (*i*).

Does not
protect title
deeds at
law.

The lien is not in the nature of an "express trust" Is not in

(*b*) As to the distinction between the vendor's lien and the right of stoppage *in transitu* on a sale of personal chattels; see *McEwan v. Smith*, 2 H. L. C. 309.

(*e*) 15 Ves. 337, 341.

(*f*) See *Mackreth v. Symmons*, 15 Ves. 329.

(*g*) Sug. 881; but see *Manningford v. Toleman*, 1 Coll. 670 *et qu.*

(*h*) *Worthington v. Morgan*, 16 Sim. 547.

(*c*) See *Winter v. Lord Anson*, 3 Russ. 488; and see the judgment in *Mackreth v. Symmons*, 15 Ves. 336, where the earlier cases are cited.

(*i*) *Goode v. Burton*, 11 Jur. 851, in which see the remarks made by the Court upon Mr. Justice Holroyd's dictum in *Esdaile v. Oxenham*, 3 B. & C. 229.

(*d*) See *Fawell v. Heelis*, Amb. 724; *Blackburn v. Gregson*, 1 Bro. C. C. 420; *Bowles v. Rogers*, cited 6 Ves. 95.

Chap. XIV.

nature of an
express
trust.

within the 25th sect. of the 3 & 4 Will. IV. c. 27; and is therefore barred by the 40th sect. after twenty years from the day fixed for payment; there having been no interim payment nor written acknowledgment of title (*k*).

Is assign-
able by
parol.

It would appear to be assignable by parol (*l*), but the assignee will take subject to any prior equitable incumbrances created by the vendor (*m*).

Marshalling
for lien.

And it appears to be the result of the modern authorities (*n*) that where the vendor's claim is satisfied out of the personal estate of a deceased purchaser, Equity will, by marshalling the purchased estate and the personal estate, give the benefit of the vendor's lien to simple-contract creditors and legatees of the purchaser, if he have died intestate as respects the purchased estate; and to simple-contract creditors, but not to legatees, if the estate be devised.

Is lost by
taking in-
dependent
security.

When the vendor takes an independent security for payment, this will, as a general (*o*) but not universal rule (*p*), amount to an abandonment of the lien; as when he takes a security upon stock (*q*), or a mortgage of another estate (*r*); so, taking a mortgage of part of the sold estate is an abandonment of his lien as respects the residue (*s*); and taking a mortgage upon the estate for a part only of the unpaid purchase-money, is an abandonment of the lien for the balance (*t*).

But not by
taking note,
bill, or bond;

But he will not be held to have abandoned his lien from the sole fact of his taking any document which merely evidences, or facilitates the enforcement of, his claim

(*k*) *Toft v. Stephenson*, 7 Ha. 1.

(*l*) *Dryden v. Frost*, 3 Myl. & Cr. 670.

(*m*) *Lacey v. Ingle*, 2 Ph. 313; and see *Mangles v. Dixon*, 1 Mac. & G. 437.

(*n*) See Sug. 878, and cases cited.

(*o*) Sug. 862.

(*p*) 15 Ves. 348.

(*q*) *Nairn v. Prowse*, 6 Ves. 752.

(*r*) See 6 Ves. 760.

(*s*) *Capper v. Spottiswoode*, Taml. 21.

(*t*) *Bond v. Kent*, 2 Vern. 281.

against the purchaser; *e. g.* a promissory note, or bill of exchange, or bond (*u*): nor is it material that the money is to remain unpaid for a specified period, *e. g.* the life of the vendor (*v*).

Chap. XIV.

although payment agreed to be deferred,

And as promissory notes and bills of exchange are considered merely as a mode of payment (*w*), it seems that if a third person join in them as surety, this will not affect the lien (*x*).

or third parties join in note or bill.

Whether the lien would be affected by taking a bond or covenant from a third person, appears to be undecided (*y*); but probably such would be the case (*z*).

Whether affected by surety joining in bond.

Where the sale was expressed to be made in consideration of the purchaser's subsequent covenant to pay an annuity and a gross sum of 3000*l.* in the event of his own marriage, there was held to be no lien upon the estate for the 3000*l.* (*a*): upon this decision it may be remarked, that the nature of the consideration, and the fact of a covenant being taken, furnished strong arguments in favour of an intention to abandon the lien as respects the 3000*l.*; for the existence of a lien for a gross sum, the payment of which might remain contingent during the life of the purchaser, and which depended upon an event the probabilities of which were not matters of calculation and which could not have been guarded against by any scheme of insurance, would have left the estate in his hand inalienable except at a most serious sacrifice.

Whether lost if conveyance be expressly in consideration of covenant,

the sum being payable upon an incalculable contingency.

So, where a daughter, on the eve of marriage, sold to her father her reversion of an estate, and the conveyance was expressed to be in consideration of the sum of 3000*l.* secured to her upon the terms mentioned in a bond of

Or if conveyance be expressly in consideration of a bond.

(*u*) *Winter v. Lord Anson*, 3 Russ. Lef. 132, 136; *Grant v. Mills*, 2 Ves. 488, 490. & B. 306.

(*v*) *S. C.* (*y*) 2 Ves. & B. 309.

(*w*) 15 Ves. 349; see *Teed v. Carruthers*, 2 Y. & C. C. C. 31. (*z*) *Cood v. Cood*, 10 Price, 109; Sug. 860.

(*x*) *Hughes v. Kearney*, 1 Sch. & (*a*) *Clarke v. Royle*, 3 Sim. 499.

Chap. XIV.

even date, and the indorsed receipt was for "a bond for the sum of 3000*l.*, being the full consideration within expressed to be given;" the bond being in fact for securing to her an annuity of 100*l.* during the joint lives of herself, her husband and father, and for payment of a sum of 3000*l.* in certain contingencies depending upon lives and the existence of issue, and subject to a proviso avoiding the bond (as regarded the 3000*l.*) in the event of the father by deed or will making a certain specified provision for his daughter or her husband, it was held that no lien upon the estate was intended to or did exist (*b*).

Whether affected by mere fact of conveyance being in consideration of a covenant or bond;

The last two decisions, it is submitted, hardly establish that the lien would be discharged by the mere fact of the conveyance being expressed to be made in consideration of a bond or covenant for payment of a gross sum in all events; the sum being in fact so made payable; indeed, *Parrott v. Sweetland* appears to have been considered rather as a case of family arrangement than an ordinary transaction between vendor and purchaser (*c*); and *Clarke v. Royle* partook of the same character; they may, however, it is conceived, induce a doubt whether *Winter v. Lord Anson* (*d*) would be an authority for the existence of the lien where a vendor takes a bond for a future consideration payable upon incalculable contingencies.

or if bond be for securing purchase-money upon an incalculable contingency.

If, however, the consideration be payable upon a calculable contingency, it appears that taking a bond or covenant for its payment would not affect the lien; this conclusion seems to be warranted by those cases upon sales in consideration of an annuity next adverted to.

Bond for securing payment on calculable contingency, lien not affected; *semble*.

Lien for annuity consideration, is not affected by bond;

The authorities seem to show, that, in the absence of special circumstances, a vendor who sells in consideration of even a life annuity, retains a lien upon the estate, although he take a bond or covenant for payment; this

(*b*) *Parrott v. Sweetland*, 3 Myl. & K. 655.

(*c*) See 3 Myl. & K. 664.

(*d*) 3 Russ. 488.

was decided in *Tardiffe v. Scrugan* (e); a case which, although doubts have been entertained respecting it (f), is considered by Sir *E. Sugden* to be an authority (g); and his opinion has been recently followed by Sir *James Wigram*, V. C. (h), who, however, in some degree grounded his decision upon the circumstance of the purchaser having covenanted with the vendor to uphold the property.

Where, however, an equity of redemption was sold in consideration of two annuities, which were granted and covenanted to be paid by a deed of even date with the conveyance, and the conveyance was expressed to be made by the mortgagor and mortgagee in consideration of the annuities having been so granted, and of the mortgage debt having been paid by the purchaser, it was held, that the circumstance of the separate deed being taken as a security for the annuities, and the statement of the consideration in the conveyance, evidenced an intention that there should be no lien upon the estate (i).

except under special circumstances, *e.g.*, annuity granted by distinct deed.

So, where a reversion was sold in consideration of immediate life annuities, which were secured by bond, it was considered by Lord *Eldon*, that the nature of the estate, and the fact of a bond being taken, showed that the parties did not intend the lien to subsist; the annuities might all determine before the reversion fell into possession; and this, coupled with the fact of the purchaser taking the bond, showed that he did not intend the lien on the reversion to subsist (k); but the decision is disapproved of by Sir *E. Sugden* (l).

Whether affected by bond in case of sale of reversion.

(e) Cited 1 Bro. C. C. 423.

Ves. 351.

(f) See 15 Ves. 352; 3 Sim. 502; but see 13 Sim. 412.

(g) Sug. 870.

(h) *Matthew v. Bowler*, 6 Ha. 110.

(i) *Buckland v. Pocknell*, 13 Sim. 406.

(k) See *Mackreth v. Symmons*, 15

(l) Sug. 869, and note, that the same objection to the existence of the lien existed in *Parrott v. Sweetland*, *ubi supra*, which was a case of a sale of a reversion in consideration of an annuity and a gross sum.

Chap. XIV.

Lien may
subsist as to
only part of
unpaid
money.

Presumable
intention
either way
may be
rebutted.

Lien, how
lost as
against
third parties.

None im-
plied in
favour of
disqualified
parties.

And it was decided, in the same case, by Lord *Eldon*, that the nature of the transaction may show that the lien is to subsist as to part of the unpaid purchase-money, but not as to the residue.

And as taking a substantive and independent security destroys the lien, not by virtue of any technical rule but merely by indicating the intention of the vendor, the lien may, notwithstanding the security, be preserved, either by express agreement, or by any expressions negating the presumable intention to abandon it; *e. g.*, a stipulation that the estate shall not be sold until the money is paid, or with the consent of the vendor and the surety (*m*): and, on the other hand, the intention to abandon the lien in cases where only a note or bond is taken, may be evidenced by a parol express agreement (*n*) or by any expressions inconsistent with its continuance; *e. g.*, expressions referring to a resale of the property before the time fixed for payment of the amount due to the vendor (*o*).

Where a vendor joined in a deed by which the purchaser mortgaged the estate to a third party who advanced part of the purchase-money, he, of course, was held to have, as against such mortgagee, no lien for the unpaid balance (*p*): so, where, upon a purchase by trustees, the vendor, knowing the money to be trust money, signed the usual indorsed receipt, but allowed part of it to remain in the hands of one of the trustees without the knowledge of his co-trustees, or *cestuis que trust*, he was held to have no lien on the estate (*q*).

And no lien will be assumed in favour of parties who are, by law, disqualified from holding such an interest in real estate (*r*).

(*m*) *Elliot v. Edwards*, 3 Bos. & P. 181.

(*n*) 1 Sim. & St. 445.

(*o*) See *Ex parte Parkes*, 1 G. & J. 228.

(*p*) *Cood v. Pollard*, 9 Pri. 544.

(*q*) *White v. Wakefield*, 7 Sim. 401.

(*r*) *Harrison v. Southcote*, 2 Ves.

389, 393; and see 15 Ves. 337.

A vendor's lien can only be enforced by suit in Equity ; and he cannot, at the same time, sue in Equity, and bring an action at Law upon any bond or other security which he may have taken for payment of the money ; but if he fail in one remedy he may resort to the other (s).

Chap. XIV.

Lien merely equitable: vendor cannot at once sue at law and in equity.

Where the vendor conveys the estate to the purchaser, and takes a reconveyance, by way of mortgage, for securing payment of part of the purchase-money, his lien appears to render the existence of judgments against the purchaser immaterial.

Is a protection against purchaser's judgment-creditors, when purchase-money remains on mortgage.

A vendor, having given the usual release in the body of the conveyance for the purchase-money, cannot bring an action for interest which has been omitted to be paid through an error of calculation (t).

Vendor has no claim for mis-calculated interest.

(2.) *Whether the vendor has any remedy if estate has been sold at an undervalue ;—or more has been conveyed than was intended.*

The vendor, after conveyance, has no remedy, if the property prove to be, either as respects quantity or quality, more valuable than was imagined ; for instance, where the residue of a lease, of which twenty years were in fact unexpired, was sold under the impression that only eight years were to run, and the price was fixed on that supposition, the vendors, although trustees, were held bound by the conveyance: Lord *Cottenham*, in affirming the decree of V. C. *K. Bruce* dismissing the vendors' bill, observed, " Suppose a party proposed to sell a farm, describing it as ' all my farm of 200 acres,' and the price was fixed on that supposition ; but it afterwards turned out to be 250 acres, could he afterwards come and ask for a reconveyance of the farm or payment of the difference ?

Nor in respect of mistake as to extent or value of the property ;

(s) *Barker v. Smark*, 3 Beav. 64.

(t) *Harding v. Ambler*, 3 Mee. & W. 279.

Chap. XIV. Clearly not; the only equity being that the thing turns out more valuable than either of the parties supposed. And whether the additional value consists in a longer term or larger acreage is immaterial" (*u*).

or the
extent of his
interest
therein.

Nor, where several persons have joined in conveying an estate to a purchaser for a full consideration, can one of them be afterwards heard to say that he was under a misapprehension as to the extent of his interest in the property (*v*).

Aliter, if
property not
intended to
be dealt
with is con-
veyed.

But the above cases must be distinguished from those where the conveyance, by mistake, comprises more than *either* party intended to deal with (*w*); as if, upon a contract for sale of farm A., the conveyance were by mistake to include lands parcel of farm B.; the difference between the cases is this, *viz.*, that in the latter the parties never intended to deal with the property which was conveyed; while, in the former (*x*), "the vendors did intend to sell all their remaining interest in the lease, but by their own mistake they misdescribed what that interest was (*y*):" so, in the case put by Lord *Cottenham*, the vendor would really intend to sell the entire farm, and the only mistake would be as to the quantity. We may here remark, that, at Law, evidence cannot be received to contradict the conveyance by showing that property, which would *primâ*

(*u*) *Okill v. Whittaker*, 2 Phill. 338.

(*v*) *Malden v. Merick or Menil*, 2 Atk. 8; *Marshall v. Collett*, 1 Y. & C. 232; and see also *Sturge v. Starr*, 2 Myl. & K. 195, where a woman, who had a life interest settled to her separate use, joined with her supposed husband (who was in fact married to another woman) in assigning it to a purchaser, and was held bound by the assignment: as to which it is difficult to understand how any fair question

could be raised, since the woman assigned the property not *quâ a feme covert*, but as being, in regard thereto, a *feme sole*, in contemplation of a Court of Equity.

(*w*) *Tyler v. Beversham*, Rep. t. Finch, 80; see *Beaumont v. Bramley*, Turn. & R. 41; *Marquess v. Marchioness of Evers*, 3 Myl. & Cr. 321; *Mortimer v. Shortall*, 2 Dru. & W. 363.

(*x*) *Okill v. Whittaker*, *ubi supra*.

(*y*) 2 Phil. 341.

fucie pass under general words, was not intended to be included in the purchase (z). Chap. XIV.

If, however, the vendor in fixing the price have altogether relied upon information furnished to him by the purchaser, and such information turn out to have been (even unintentionally) materially incorrect, this, it appears, may entitle the vendor, even after conveyance, to have the contract set aside (a). Or if vendor in fixing price rely on purchaser's information.

And the same relief has been afforded, where a purchaser knowingly obtained, for an inadequate consideration, a conveyance from a vendor in humble circumstances and ignorant of his rights (b), and, in other cases, where advantage has been taken of the vendor's distress to procure an unfair bargain (c). And in a case where a person, who well knew the value of the property, obtained from a young man, a common sailor, lately come ashore and much pressed for money, an estate for a grossly inadequate price, the Court, even as against the devisees of the purchaser, appointed a receiver before the hearing (d). Or if purchase were at under-value from vendor ignorant of his rights or whose distress has been taken advantage of.

It was laid down by Lord *Langdale* in a recent case (e), that a man who is in distress may nevertheless contract; and if, being in distress, he procure other persons to consent to an agreement which he would not himself have requested or consented to if he had not been in distress, and afterwards successfully urges and obtains the performance of that agreement, and, after that, acquiesces for a length of time in the performance, without any notice General rule as to distress.

(z) *Doe d. Norton v. Webster*, 4 417; *Gordon v. Crawford*, and other Per. & Dav. 270. cases, cited Sug. 313.

(a) *Carpmael v. Powis*, 11 Jur. 158; 10 Beav. 36. (d) *Stihwell v. Wilkins*, Jac. 280; see *Farmer v. Farmer*, 1 H. L. C.

(b) *Evans v. Llewellyn*, 2 Bro. C. 724, where the vendor was deaf and dumb, but under the circumstances relief was refused.

(c) See *Wood v. Abrey*, 3 Madd. 417; *Knight v. Marjoribanks*, 11 Beav.; see p. 349.

Chap. XIV. of dissatisfaction or complaint, he is not entitled to set aside the transaction on the mere ground of his poverty or distress, in the absence of any deception or fraud proved to have been practised on him.

Inadequacy of consideration no general reason for setting aside conveyance.

We shall hereafter see (*f*) that, upon the purchase of an estate in possession, mere inadequacy of consideration, unless shown to be the result of fraud, surprise, misrepresentation, or improper concealment on the part of the purchaser, will be no defence even to a suit for specific performance, unless the inadequacy be so great as in itself to furnish evidence of fraud (*g*); and a stronger case than what would suffice as a defence to a suit for specific performance, would be necessary to enable the vendor to rescind the contract after conveyance (*h*).

Uncertain amount of purchase-money.

A distinction has been made between cases where the consideration was for a stated sum, and for an uncertain amount, *e. g.*, a life annuity; but it seems doubtful whether this is sustainable (*i*).

Distinction in cases of reversionary interests.

But there is a well recognised distinction between sales of estates in possession and estates in reversion; and on sales of the latter description, if effected by private contract, mere inadequacy of consideration will enable the Court to decree a reconveyance; and the *onus probandi* does not, as in ordinary cases, rest with the plaintiff seeking to impeach the sale, but with the defendant (*k*).

Onus probandi lies on purchaser.

What interests are considered reversionary

And this relief will be afforded where a small part of the property is in possession and the bulk is rever-

(*f*) *Infra*, Ch. XVIII.

(*g*) See *Rice v. Gordon*, 11 Beav. 265.

(*h*) See Sug. 312, 314; *Vigers v. Pike*, 8 Cl. & Fin. 645; *Playford v. Playford*, 4 Ha. 546; *Bellamy v. Sabine*, 2 Ph. 425; *Wilde v. Gibson*, 1 H. L. C. 617. Lord Eldon seems to have entertained a different opi-

nion, see *Coles v. Trecothick*, 9 Ves. 234.

(*i*) *Vide infra*, Ch. XVIII.

(*k*) See *Coles v. Trecothick*, 9 Ves. 246; *Gowland v. De Faria*, 17 Ves. see p. 24; *Hincksman v. Smith*, 3 Russ. 433; *Kendall v. Beckett*, 2 Russ. & Myl. see p. 90; *Addis v. Campbell*, 1 Beav. see p. 262.

sionary (*l*) ; but not where the tenant for life concurs with the immediate reversioner, so that the sale is, in effect, of an estate in possession (*m*) ; nor where the sale is made by a vendor entitled to what is, substantially, an estate in possession, and to the ultimate reversion, subject only to an intervening life estate (*n*) ; nor where the contract is entered into between a tenant and the person entitled to the reversion and to the rents during the term (*o*) ; and relief will be more sparingly afforded where the reversion is subject to an almost incalculable contingency, as where it is expectant on the death, without issue, of a tenant for life aged sixty-three and unmarried (*p*) ; although the existence of such a contingency is no absolute protection to a purchaser at an undervalue (*q*).

And the relief is afforded, as well to the mere owners of reversionary interests (*r*), as to heirs dealing with their expectancies ; although an extraordinary protection is afforded to the latter class of vendors (*s*).

And where a person bought a reversion at a gross undervalue from an heir in distressed circumstances, and resold it at a large profit to a sub-purchaser who had full notice of the original fraud, and the reversioner, being still in distress, joined in and confirmed the resale, but nothing was paid or secured to him as a consideration for such concurrence, the transaction was set aside as against the

Chap. XIV.
within the
rule.

Relief given
to vendors
of reversions
as well as to
expectant
heirs

Relief af-
forded as
against sub-
purchaser
with notice
notwith-
standing
voluntary
confirmation
by re-
versioner.

(*l*) *Lord Portmore v. Taylor*, 4 Sim. 182.

(*m*) *Wood v. Abrey*, 3 Madd. 417 ; see *Cooke v. Burtchaell*, 2 Dru. & W. 165 ; and *Sibbering v. Earl of Balcarres*, 14 Jur. 753, V. C. K. B.

(*n*) *Wardle v. Carter*, 7 Sim. 490.

(*o*) *Scott v. Dunbar*, 1 Moll. 459.

(*p*) *Baker v. Bent*, 1 Russ. & Myl. 224 ; and see *Whichcote v. Bramston*, cited 4 Sim. 202.

(*q*) See Sug. 325 ; *Addis v. Campbell*, 4 Beav. 401 ; *Davies v. Cooper*,

5 Myl. & Cr. 270 ; *Boothby v. Boothby*, 1 Mac. & G. 604 ; *Woodroffe v. Allen*, 1 H. & J. 73 ; father and son, when dealing with a third person, need not be represented by separate solicitors, *S. C.* ; *Cooke v. Burtchaell*, 2 Dru. & W. 165.

(*r*) *Bawtree v. Watson*, 3 Myl. & K. 339 ; *Davies v. Cooper*, 5 Myl. & Cr. 270 ; *Edwards v. Browne*, 2 Coll. 100 ; see *Sewell v. Walker*, 12 Jur. 1041.

(*s*) Sug. 314.

Chap. XIV.

sub-purchaser, on repayment of the price paid on the first purchase (*t*).

What circumstances will deprive the heir of his special protection—rules laid down in *King v. Hamlet*.

It was laid down by the Court in deciding a modern case (*u*), First, that this extraordinary protection must be withdrawn from the heir, “if it shall appear that the transaction was known to the father or other person standing *in loco parentis*, the person, for example, from whom the *spes successionis* was entertained, or after whom the reversionary interest was to become vested in possession,—even although such parent or other person took no active part in the negotiation, provided the transaction was not opposed by him, and so carried through in spite of him. Secondly, that if the heir flies off from the transaction, and becomes opposed to him with whom he has been dealing, and repudiates the whole bargain, he must not, in any respect, act upon it so as to alter the situation of the other party, or his property; at least that if he does so, the proof lies upon him of showing that he did so under the continuing pressure of the same distress which gave rise to the original dealing.”

Sir. E. Sugden's comments thereon.

The first of these propositions is criticized by Sir *E. Sugden*, who observes that the equity is that of the son (*v*), not of the parent; and in a late case (*w*) a purchase was set aside upon the ground of inadequacy, the tenant for life being herself the purchaser: as to the second of the above propositions, Sir *E. Sugden* remarks, that without the concluding qualification it could not safely be acted upon (*x*).

(*t*) *Addis v. Campbell*, 4 Beav. 401; but the case would be different if the sub-purchaser had no notice of the original fraud, even although he might not have acquired the legal estate; see *Nagle v. Baylor*, 3 Dru. & W. 60; see too *Sibbering v. Earl of Balcarres*, 14 Jur. 753, V. C. K. B.

(*u*) *King v. Hamlet*, 2 Myl. & K. see p. 473.

(*v*) Sug. 316.

(*w*) *Edwards v. Browne*, 2 Coll. 100; and see *Playford v. Playford*, 4 Ha. 546.

(*x*) Sug. 316. As to transactions in the nature of family arrangements

The question of adequacy of consideration must be determined with reference to circumstances as existing at the date of the contract, and not to subsequent events (*y*) : it was formerly held (*z*) sufficient to avoid the transaction, that the price paid was not the estimated value according to the tables used by actuaries ; but subsequent decisions and authorities seem to have established the more reasonable doctrine, that the market value, (which is generally about two-thirds of the estimated value (*a*),) is alone to be regarded (*b*) : and, on a *bonâ fide* sale by auction, its result is considered in itself to fix the market value (*c*). In a late case, where the market value appeared to have been rather better than 1900*l.*, and the price paid was 1700*l.*, the Court held, that the inadequacy was sufficient to entitle the vendor to relief (*d*).

It was held in a modern case, that where goods are sold to a person in distressed circumstances by a tradesman, who knows that they are bought merely with a view to raise money by selling them again, and they are charged at fair and reasonable prices, and the purchaser, by way of security for the price, mortgages his reversionary interests as expectant heir, the Court will not set aside the securi-

Chap. XIV.

Adequacy of consideration, how determined.

Security for price of goods bought to resell and so raise money supported.

between father (tenant for life) and son (tenant in tail), see *Bellamy v. Sabine*, 2 Ph. 425 ; *Lord Aldborough v. Trye*, 7 Cl. & Fin. 436 ; *Cooke v. Burtchaell*, 2 Dru. & W. 165 ; see also, as to family arrangements generally, *Farmer v. Farmer*, 1 H. L. C. 724 ; and *Persse v. Persse*, 7 Cl. & Fin. 279 ; *Westby v. Westby*, 2 Dru. & W. 502 ; such arrangements are exempt from the strict rules applicable to cases between ordinary vendors and purchasers : see a case of such an arrangement being set aside, *Sturge v. Sturge*, 14 Jur. 159.

(*y*) *Gowland v. De Faria*, 17 Ves. 20.

(*z*) *S. C.* ; and see *Peacock v. Evans*, 16 Ves. 512.

(*a*) See *Potts v. Curtis*, You. 543.

(*b*) *Lord Aldborough v. Trye*, 7 Cl. & Fin. 436 ; *Hincksman v. Smith*, 3 Russ. see p. 435 ; *Headen v. Rosher*, 1 M'Clel. & Y. 89 ; *Potts v. Curtis*, You. 543 ; *Wardle v. Carter*, 7 Sim. 490 ; see *Sewell v. Walker*, 12 Jur. 1041.

(*c*) *Shelly v. Nash*, 3 Madd. 232 ; *Fox v. Wright*, 6 Madd. 111 ; *Lord Aldborough v. Trye*, 7 Cl. & Fin. 436.

(*d*) *Edwards v. Browne*, 2 Coll. 100.

Chap. XIV. ties (e). * In an earlier case, a bond, given for silks taken up to sell to raise money, was allowed to stand as a security only for the sum really raised (f); but the decision turned upon the transaction being a loan at usurious interest: the transfer of goods being a shift or cloak for usury (g).

When sale fraudulent as against tenant in tail will be set aside at suit of remainderman whom he might have barred.

It would seem that where fraud has been practised on a tenant in tail, and has been carried into effect by barring the entail, and he dies without issue, and without confirming the transaction, the next remainderman may file a bill to set it aside; but not if there were an independent intention to bar the entail, and the fraud applied only to some part of the transaction distinct from that object (h).

Terms on which vendor is entitled to relief.

When relief is given, the conveyance will stand as a security for the principal sum and simple (but not compound (i)) interest (k); and for moneys expended by him in lasting and valuable improvements, and interest (l); he will, of course, be charged with what he has actually received, and interest; and, in one case, where he had received from the vendor interest on the purchase-money, such payments were held to have been in reduction of the principal, and he himself was charged with interest upon them (m); and it seems doubtful whether he will not, like a mortgagee, be charged with what without wilful default he might have received (n): where inadequacy of price is the sole ground for the interference of the Court, he may

(e) *King v. Hamlet*, 2 Myl. & K. 456; 9 Bligh, 610; see Sir E. Sugden's remarks, Sugden's Law of Property, 65 *et seq.*

(f) *Barker v. Vansommer*, 1 Bro. C. C. 149.

(g) *Per Lord Brougham*, C., 2 Myl. & K. 485.

(h) See *Bellamy v. Sabine*, 2 Ph. 425.

(i) *Gowland v. De Faria*, 17 Ves. 20.

(k) *S. C.*

(l) *Murray v. Palmer*, 2 Sch. & Lef. 490.

(m) *S. C.*, *ib.* 488.

(n) See Sug. 327, and the judgment in *Murray v. Palmer*, 2 Sch. & Lef. 489, against such liability; but see *contra* the decree, *ib.* 490.

be allowed his costs (*o*) : but slight additional circumstances will induce the Court to refuse them (*p*). Chap. XIV.

And, of course, long delay and clear (*q*) acquiescence on the part of the vendor,—(and this notwithstanding his poverty,)—or his advised confirmation of the purchase, will bar the right to relief (*r*) : and we may here remark, that the statement of consideration in the conveyance is not conclusive, but any additional consideration, not inconsistent with the terms of the deed, may be established by parol evidence (*s*). Right to, lost by acquiescence or confirmation.

(3.) *Vendor's rights of pre-emption under Lands Clauses Consolidation Act, 1845.*

By the Lands Clauses Consolidation Act, 1845, the promoters of the undertaking authorized by the special Act, are required, within the periods thereby prescribed, or, if no period be prescribed, within ten years after the expiration of the time thereby limited for the completion of the works, to sell such lands as shall not be required for the purposes of the undertaking; and such superfluous lands, unless they be situate in a Town (*t*), or be lands built upon or used for building purposes, are to be first offered to the person then entitled to the lands, if any, from which the same were originally severed; or, if he

Rights of pre-emption, &c., of vendors under Lands Clauses Consolidation Act, 1845, in respect of superfluous lands.

(*o*) *Bawtree v. Watson*, 3 Myl. & K. see p. 341, and earlier cases cited; see Sug. 326.

(*p*) *Wood v. Abrey*, 3 Madd. see p. 424.

(*q*) See *Gerrard v. O'Reilly*, 3 Dru. & W. 414.

(*r*) *Vide supra*, pp. 25, 26; and see *Knight v. Marjoribanks*, 11 Beav. 322; *Farmer v. Farmer*, 1 H. L. C. 724; *Sibbering v. Earl of Balcarres*, 14 Jur. 753, V. C. K. B.

(*s*) *Clifford v. Turrell*, 1 Y. & C. C. C. 138; affirmed 9 Jur. 633.

(*t*) The word "Town" has been held to mean, the space on which the dwelling-houses are collected so near each other that they may be said to be continuous; so also an open space occupied as a mere accessory to the convenience of a dwelling-house, would seem to come within the term; *Elliot v. South Devon Railway Company*, 5 Rail. Ca. 500.

Chap. XIV. refuse, or for six weeks neglect to signify his wish, to purchase the same or cannot be found, then to other adjoining owners; and unless a sale be made either to such person, or adjoining owners, or some other person, the superfluous lands remaining unsold at the expiration of such period are to vest in and become the property of the owners of the land adjoining thereto, in proportion to the extent of their lands respectively adjoining the same (*u*): the right of pre-emption above noticed would seem not to affect a contract entered into with a third party for the sale of superfluous land, if the offer to the parties entitled to pre-emption be made and rejected before conveyance (*v*).

(4.) *Vendor's remedies at Law and in Equity on purchaser's covenants.*

We have already seen that covenants are occasionally entered into as well by the purchaser with the vendor, as by the vendor with the purchaser; and that such covenants will, in Equity, bind a purchaser who accepts the benefit of a conveyance, although he do not execute it (*w*).

Purchaser's
covenants,
how
classified.

Covenants entered into by purchasers are of three descriptions; first, such as relate to interests possessed or acquired by the covenantee in the purchased land, independently of the covenant; *e. g.*, a covenant to pay a rent-charge issuing out of the land, or to maintain a road over it; secondly, such as are not connected with any such interests in the purchased land, but which restrict or limit its mode of enjoyment by the purchaser and his representatives; *e. g.*, a covenant that the land shall not be built upon, or shall be built on only in a particular

(*u*) See sects. 127, 128, and 129. 455, V. C. E.

(*v*) *London and Greenwich Railway Company v. Goodchild*, 8 Jur. (*w*) *Vide supra*, pp. 265, 266.

manner ; and thirdly, covenants relating to the production and custody of the title deeds (*x*). Chap. XIV.

As respects the first class of covenants, it appears to be not perfectly clear (*y*) whether the vendor or his representatives could enforce them as against an alienee of the land, even although the alienee have the estate of the original covenantor ; and where this is not the case,—as where in a conveyance to A. in fee, to such uses as B. shall appoint, and in default of appointment to the use of B. in fee, B. covenants with the vendor for payment of rent, and then conveys to C. in exercise of the power of appointment,—no action will lie against the alienee upon the covenant (*z*).

Whether first class run with the land.

As respects covenants of the second class, it appears to be extremely doubtful (*a*) whether they could, at Law, be enforced against an alienee, although the assigns be expressly named in the covenant (*b*) : it has even been doubted (*c*) whether an alienee with notice can be affected in Equity by a covenant which would not bind him at Law ; but the contrary doctrine seems to be warranted by the earlier authorities, and has been acted upon in several recent cases (*d*).

Second class do not, *semble*; but may be enforced in Equity against alienee with notice.

(*x*) See Third Report of Real Property Commissioners.

(*y*) *Ibid.* p. 53 ; but see Sug. 730, where it is held that the action will lie.

(*z*) *Roach v. Wadham*, 6 East, 289 ; and see Sug. 731, and further on the subject of privity of estate, *infra*, p. 364.

(*a*) See Third Report of Real Prop. Com. ; 2 Myl. & K. 545 ; and *Ex parte Ralph*, 1 De G. 219.

(*b*) *Sed aliter* in the case of a demise ; *Spencer's case*, 5 Rep. 16 ; it has been recently decided that

a covenant by a lessor to build a house on the demised land, or to indemnify the lessee against specified liabilities, will not, at Law, bind the assignees of the reversion, if not expressly named : *Doughty v. Bowman*, (in error,) Exch. Ch., affirming the judgment of the Q. B., 11 Q. B. 444, nor, *semble*, even if named ; see judgment.

(*c*) *Keppell v. Bailey*, 2 Myl. & K. 517.

(*d*) *Whatman v. Gibson*, 9 Sim. 196 ; *Mann v. Stephens*, 15 Sim. 377, affirmed on appeal, 379 ; *Tulk*

Chap. XIV.

But not in
all cases.

The equitable remedy is, of course, an injunction to restrain a breach of the covenant; and this will only be granted against an alienee who bought with notice of the covenant; nor will it be granted where no real damage is likely to be sustained, or the circumstances which were contemplated when it was entered into no longer exist: for instance, the Court has refused to enforce specific performance of a covenant against the erection of buildings, where the plaintiff had himself erected buildings whose effect was to destroy those very advantages which it was the object of the covenant to maintain (*e*).

Third class
—remedies
upon.

As to covenants of the third description, viz., relating to title deeds, the right to enforce them at Law against an alienee seems probably (as with covenants of the first kind) to depend upon his having the estate of the original covenantor (*f*); but an alienee who bought with notice of the covenant would be bound in Equity to produce the deeds (*g*); and it seems probable that the benefit of such a covenant by a purchaser would at Law run with the land retained by the vendor (*h*).

Covenantor
and his re-
presenta-
tives liable
on cove-
nants in
gross.

And the covenantor and his representatives may be sued upon covenants of any of the above kinds, although they may not bind the alienees of the land (*i*).

Assignee

And upon a covenant simply collateral to the land—

v. Moxhay, 11 Beav. 571; 2 Ph. 774; and see *Hemingway v. Fernandes*, 13 Sim. 228; *Bristow v. Wood*, 1 Coll. 480; see also *Schreiber v. Creed*, 10 Sim. 9; and see Sug. 742.

(*e*) *Duke of Bedford v. Trustees of British Museum*, 2 Myl. & K. 552.

(*f*) As to which, *vide infra*, p. 364, and see Sug. 481 and 483, and the remarks on *Barclay v. Raine*,

1 Sim. & Stu. 449; and see 9 Jarm. Conv. 98, 356.

(*g*) See Sug. 474; and as to the general equitable right to production, independently of any covenant, *vide supra*, p. 202, *et seq.*

(*h*) See Mr. Jarman's note, 9 Jarm. Conv. by S. 356 *et seq.*; and Third Report of Real Prop. Com. 52; but see Sug. 713.

(*i*) See and consider *Stokes v. Russell*, 3 Durn. & E. 678.

e.g., to pay a sum of money—the assignee is not liable although expressly named (*k*).

Under the recent Bankruptcy Act (*l*), when the assignees of any bankrupt, who is entitled to land, under a conveyance to him in fee, or under an agreement for such a conveyance, subject to any perpetual yearly rent thereby reserved, shall elect to take the land or the benefit of the conveyance or agreement, the bankrupt is not to be liable to pay any rent accruing after the issuing of the fiat or filing of the petition, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants and agreements in the conveyance or agreement; and if the assignees shall decline to take the land or the benefit of the conveyance or agreement he is not to be liable if, within fourteen days after notice of their having so declined, he shall deliver up the conveyance or agreement to the person then entitled to the rent or having so agreed to convey; and if the assignees do not elect on request, any person entitled to the rent or having so conveyed or agreed to convey, or any person claiming under him, may apply to the Court; and the Court may order them to elect, and deliver up such conveyance or agreement, in case they shall decline the same, and the possession of the premises; or may make such other order therein as it shall think fit.

Chap. XIV.

not liable on covenant simply collateral.

Liability of covenantee, how affected by bankruptcy.

(5.) *Purchaser's remedies on vendor's covenants.*

With some few special exceptions (*n*), a purchaser, after the conveyance is executed by all necessary parties, has no remedy at Law or in Equity in respect of any defects either in the title to, or quantity, or quality of,

Purchaser's general remedies for defects after conveyance depend on vendor's covenants.

(*k*) *Spencer's case*, 5 Rep. 16.

(*l*) 12 & 13 Vict. c. 106, see s. 145.

(*n*) *Infra*.

Chap. XIV. the estate, which are not covered by the vendor's covenants.

His remedies under covenants for title,

are only against vendor and his representatives.

And to consider first the legal rights of the purchaser and his representatives under the covenants for title.

Such covenants, it may be observed, bind only the covenantor and his representatives; and not alienees as such; it is therefore only necessary to consider who are entitled to the benefit of them.

Benefit of covenants for title runs with seisin,

Such covenants may be enforced at Law, not only by the covenantee and his representatives, but by alienees who claim under the seisin vested in the original covenantee, or, as it is expressed, in privity of estate (*n*); for instance, if A. convey land to B. and his heirs to certain specified uses, or to such uses as C. shall appoint, and covenant for title with B. and his heirs, the right to sue upon the covenants will go with the seisin to the persons from time to time claiming under the uses limited by the conveyance, or under any appointment by C. under his power (*o*); so, if the conveyance were to B. and his heirs, to such uses as C. shall appoint, and in default of appointment to the use of C. in fee, and A. covenant with C. and his heirs, and C. (instead of exercising his power of appointment) convey the estate limited to him in default of appointment, his alienee, it appears, can sue upon A.'s covenants (*p*); so, if C., in exercise of his power, appoint the land to the use of D., and covenant with him and his heirs for title, C.'s covenants can be sued upon by the alienees of D.: and in the two former cases, the right to sue upon A.'s covenants, and, in the last case the right to sue upon C.'s covenants, will go with the land to all successive owners (*q*): and the

to *cestui que* use and his alienees.

So covenants with *cestui que* use will run with his estate.

(*n*) 3 Durn. & E. 402.

(*o*) See Sug. 709.

(*p*) See Sug. 710, where the point is held to be free from doubt;

but see Third Report of Real Prop. Com. 52.

(*q*) See Sug. 709 *et seq.*

heir or assignee although not named in the covenants for title may nevertheless sue thereupon (*r*). Chap. XIV.

But, in the case last supposed, D.'s alienee, although he might sue upon C.'s covenant, could not sue upon A.'s; as he would not take the estate of A.'s covenantee (*s*); so, if C., instead of appointing to the use of D., were to appoint to such uses as D. should appoint, D.'s appointee could not sue upon C.'s covenant; for he would not take the estate of C.'s covenantee.

But cannot be sued on by alienee not claiming in privity of estate.

Sir *E. Sugden* intimates a sort of doubt (*t*) whether the doctrine of privity of estate may not apply as well to covenantor as to covenantee; that is, whether, in order that the alienee may sue, he must not only claim the estate of the covenantee, but also claim it under a conveyance or appointment by the covenantor; which, in a large proportion of conveyancing transactions, is not the case: the Real Property Commissioners consider that the doubt is set at rest by authority (*u*); and this conclusion, although not acquiesced in by Sir *E. Sugden*, is usually (it is believed) acted on in practice.

Whether there must be privity of estate, as well with covenantor as covenantee.

And the benefits of the covenants will go with the estate of the original covenantee, although leasehold (*w*), or copyhold (*x*); nor is it clearly essential that the estate should be actually vested in the covenantee at the date of the covenant; it would probably be sufficient if the covenants were entered into preparatory to the estate being so vested, and as part of the same transaction (*y*).

Covenants run with leasehold or copyhold estate.

Privity at actual date of covenant whether essential.

Where land is divided, the benefit of attendant cove- Benefit of

(*r*) See 2 Bac. Abr. 349.

436, and *Lewis v. Campbell*, 8 Taunt. 715.

(*s*) *Roach v. Wadham*, 6 East, 289.

(*x*) See *Riddell v. Riddell*, 7 Sim.

(*t*) Sug. 713.

529.

(*u*) See Third Report, p. 52, and 9 Jarm. Conv. by S. 356; Smith's Leading Cases, 3rd ed. 30.

(*y*) *Ibid.* 534, 535, and Sug. 711: the doctrine however seems open to remark, and perhaps can be scarcely relied on in practice; see 3

(*w*) *Noke v. Awder*, Cro. Eliz.

Dav. Conv. 306.

Chap. XIV.

covenants
apportioned
with land
and estate.

nants will, it seems, go to each alienee in respect of the portion of land taken by him (*z*) ; so, where the *estate* is divided, as where it becomes vested in A. for life, remainder to B. in fee, and the breach of covenant affects the entire inheritance, the owner of each portion of the inheritance can sue for damages proportioned to the extent of his estate (*a*).

Will run
with incor-
poreal here-
ditaments.

It has been decided, that covenants will run with tithes the same as with land (*b*) ; and the better opinion seems to be, that, in this respect, there is no distinction between tithes and other incorporeal hereditaments (*c*).

Remedy on
covenants in
conveyance
of equitable
estate.

Where the estate is merely equitable, there can be no assignee at Law, and the covenants cannot be enforced at Law by an equitable assignee ; so, if the conveyance, although intended so to do, do not in fact pass any legal estate, it appears that the assignee cannot sue (*d*) ; but in either case, the assignee, although unable to sue in his own name, would be entitled to sue in the name of the original covenantee (*e*).

Assignee
may sue in
name of
covenantee.

As to breach
of covenants
runs, from
title.

In considering what amounts to a breach of the several usual covenants for title, it may be premised, that, as respects the covenants for seisin in fee, (or, in the case of a lease, that the lease is valid,) and for right to convey, surrender, or assign ; and also the usual trustee's covenants against incumbrances ; the same, if broken at all, are necessarily broken immediately upon the execution of the assurance which contains them (*f*) ; so that the Statute of Limitations immediately begins to run in favour of the

Statute of
Limitations
runs, from
what time.

(*z*) See Sug. 743 ; and 9 Jarm. Conv. by S. 366 ; and *Twynam v. Pickard*, 2 B. & Ald. 105.

(*a*) See 9 Jarm. Conv. by S. 404 ; *Noble v. Cass*, 2 Sim. 343.

(*b*) *Bally v. Wells*, 3 Wils. 25.

(*c*) See 9 Jarm. Conv. by S. 360 ; and Sug. 724.

(*d*) 9 Jarm. Conv. by S. 366.

(*e*) See *Riddell v. Riddell*, 7 Sim. 529.

(*f*) See *Salman v. Bradshaw*, Cro. Jac. 304 : as to whether recitals of the vendor's title in the conveyance can estop the purchaser, *vide supra*, p. 233.

covenantor: whereas the usual covenants that the purchaser shall enjoy the estate, free from incumbrances, and for further assurance, can only be broken by subsequent events; and the Statute does not begin to run until there is an actual breach, and then only in respect of that particular breach (*g*).

Chap. XIV.

A covenant that the vendor is seised in fee of an estate conveyed as freehold, is, of course, broken, if the estate be copyhold (*h*); and a covenant that the vendor and another conveying party have good right to convey, is broken, if such other party, although having the estate, be under any personal incapacity to transfer it (*i*).

Covenants for seisin and right to convey, how broken.

The purchaser may, if he please, bring an action immediately on discovering the defect in title, without waiting to be evicted or disturbed (*k*).

Purchaser may sue before eviction.

The common covenant for quiet enjoyment is broken by a suit in Equity, although equitable disturbances be not specified (*l*); or by the obstruction of a necessary right of way (*m*), or a verbal notice to tenants to pay rent to the adverse claimant (*n*); the covenant, if general, is not broken by a *wrongful* claim or eviction (*o*), unless it be the act of the covenantor himself or his heirs or executors (if named) (*p*), in which case the wrongful act, if intended as a claim to title (*q*), is a breach even of a covenant against lawful disturbances (*r*); and a covenant in terms extending

Covenant for quiet enjoyment and free from incumbrances.

(*g*) See 9 Jarm. Conv. by S. 402.

(*h*) *Gray v. Briscoe*, Noy, 142: the word "not" in the report is evidently a clerical error; see context.

(*i*) *Nash v. Aston*, Sir T. Jones, 195.

(*k*) Sug. 764.

(*l*) *Hunt v. Danvers*, T. Raym. 370; and see 2 Vent. 214; Sug. 746.

(*m*) *Andrews v. Paradise*, 8 Mod. 318.

(*n*) T. Raym. 371.

(*o*) See *Kirby v. Hansaker*, Cro. Jac. 315; *Dudley v. Folliott*, 3 Durn. & E. 584.

(*p*) See 9 Jarm. Conv. by S. 376.

(*q*) See *Penn v. Glover*, Cro. Eliz. 421; *Morgan v. Hunt*, 2 Vent. 213; *Lloyd v. Tomkies*, 1 D. & E. 671.

(*r*) *Lloyd v. Tomkies*, *ubi supra*.

Chap. XIV. to pretended claims (*s*), or a general covenant against disturbances by specified individuals (*t*), or by claimants in general (with a specified exception) (*u*), is broken by a wrongful disturbance: it was held in one case (*w*), that covenants for seisin in fee and good right to convey free from incumbrances, were not broken when parties were, at the date of the conveyance, in actual possession of part of the estate under leases made by a stranger under a mistake; but the decision seems to be of very doubtful authority (*x*).

Meaning of
particular
expressions
—"acts,"
"means,"

The word "acts" means something done by the person against whose acts the covenant is made; and the word "means" has a similar meaning, viz., something proceeding from the person covenanting (*y*) or the person against whose acts, &c., the covenant is made; where A. procured a fine to be levied to himself and his wife and his own heirs, an entry by the widow was held to be a breach of his covenant with a lessee for quiet enjoyment against himself (A.) and all persons claiming by his "means" (*z*); so, a covenant for quiet enjoyment against all persons claiming "under" the covenantor, is broken by an entry by his widow (*a*), or by a person claiming under the exercise by the covenantor of a power of appointment, although the estate was never vested in the covenantor (*b*); but a covenant for quiet enjoyment against persons claiming "by, from, or under" him, seems not to extend to persons claiming by title paramount in respect of his mere default (*c*), although it may be otherwise where the para-

"claiming
under;"

(*s*) *Chaplain v. Southgate*, 10 Mod. 384.

(*t*) *Foster d. Wilson v. Mapes*, Cro. Eliz. 212.

(*u*) *Woodroff v. Greenwood*, Cro. Eliz. 518.

(*w*) *Jerritt v. Weare*, 3 Pri. 575.

(*x*) See Sug. 747.

(*y*) *Per Cur.* in *Spencer v. Marriott*, 1 B. & C. 459.

(*z*) *Butler v. Swinerton*, Cro. Jac. 657.

(*a*) *Anon.* Godb. 333.

(*b*) *Hurd v. Fletcher*, Doug. 43.

(*c*) *Stanley v. Hayes*, 2 G. & Dav. 411; a case of distress for land tax

mount title is brought into operation by his "acts" (*d*) : a covenant for quiet enjoyment against persons claiming "by or through his default," would, it appears, be broken by an entry by parties whose title he had it in his own power to bar;—*e. g.*, if he were tenant in tail in possession, and the entry were made by remaindermen (*e*) ;—and such a covenant has been held to extend to claims in respect of arrears of quit rent, although they accrued due before he acquired the estate (*f*) ; the decision, however, is disapproved of by Sir *E. Sugden* (*g*) ; but the omission by the covenantor to acquire from other parties a valid title, although he knew the defect, is not a "neglect or default" within the meaning of such a covenant (*h*).

Chap. XIV.

"default;"

"neglect or default;"

A covenant that the covenantor has not knowingly or willingly "permitted or suffered" any act, &c., does not extend to an act by others which he was a party to but had no power to prevent; *e. g.*, a mortgage in which he (as trustee to bar dower) has concurred (*i*) : but, of course, in such a case, the covenant would have been broken had it proceeded in the usual form "or been party or privy to" (*k*).

"permitted, or suffered;"

"party or privy to."

It seems doubtful whether covenants for title would be held to extend to a defect known to the purchaser at the time of their being entered into (*l*) : and it has been sug-

As to covenants against known defects.

which the covenantor ought to have paid ; but see *Ireland v. Bircham*, 2 Sc. 207.

Ves. J. 544.

(*d*) See a note to 9 Jarm. Conv. by S. 380, where the learned editor, coming to a different conclusion, contends that for this purpose acts and defaults are identical, as to which, query ; and see Sug. 751, where the decision in *Stanley v. Hayes* is approved of.

(*f*) See *Howes v. Brushfield*, 3 East, 491.

(*g*) Sug. 750.

(*h*) See *Woodhouse v. Jenkins*, 9 Bing. 431.

(*i*) *Hobson v. Middleton*, 6 B. & C. 295.

(*k*) See 6 B. & C. 303.

(*l*) See Butler's note to Co. Litt. 384. a.

(*e*) *Lady Cavan v. Pulteney*, 2

Chap. XIV.

gested (*m*) that such a defect should be particularly specified, and that, unless it be apparent on the face of the conveyance, the covenant should be entered into by a separate instrument; if, however, the defect be not so apparent, it is conceived that a memorandum, signed by the covenantor and admitting that the defect was known and intended to be provided for by the covenants, would be sufficient: for as the covenantor seeking to escape the general terms of the covenant must then by evidence dehors the deed show that the covenantee had notice of the defect, so the covenantee might similarly show that the defect though known was not intended to be excepted (*n*): but the defect, if apparent on the conveyance, should be specified in the covenants.

Covenant
for further
assurance—
what acts
not com-
prised in.

The ordinary covenant to do all “reasonable” acts for further assurance, or all such acts, &c. as the purchaser shall reasonably require, is not broken by a refusal to do an unnecessary act (*o*); or by a refusal occasioned by the act of God; *e. g.*, the insanity (*p*), death, or severe illness of the party whose further assurance is required (*q*); or by a refusal to give a bond for quiet enjoyment (*r*); or, according to the general opinion, a covenant for production of title deeds (*s*); or, perhaps, to enter into fresh covenants for title (*t*).

What are

But such covenant will be broken by a refusal to convey

(*m*) *Ibid.*; Sug. 702; and 9 Jarm. by S. 381.

(*n*) See 1 Sim. & Stu. 445.

(*o*) *Warn v. Bickford*, 9 Pri. 43.

(*p*) *Pet and Cally's case*, 1 Leon. 304.

(*q*) See *Nash v. Aston*, Sir T. Jones, R. 195; and *Anon.* Moore, 124, where sickness was held a valid reason for a married woman not levying a fine, and the Court agreed

that the case would be the same, “*si la feme soit grosement enseint sic ut ne poit traveller.*”

(*r*) *Staynroyde v. Locock*, Cro. Jac. 115.

(*s*) See *Hallett v. Middleton*, 1 Russ. 243; Sug. 461.

(*t*) *Coles v. Kinder*, Cro. Jac. 571, but the point is not clear; see Sug. 769; and 9 Jarm. Conv. by S. 401, n.

any interest acquired in the estate, even by purchase for valuable consideration (*u*) ; or to execute a duplicate of the conveyance, if the original has been burnt (*v*), or (*semble*) handed over to a sub-purchaser of part of the estate (*w*) ; but, in such cases the conveyance should bear an indorsement expressing that it is a duplicate (*x*).

Chap. XIV.
comprised
in.

The party called upon to execute the further assurance may claim a reasonable time in which to procure professional assistance (*y*) ; and, according to modern practice, which the Courts would doubtless recognize, a draft of the proposed assurance is furnished to him, that he may submit it to his legal advisers (*z*).

Time allowed to party required to execute further assurance.

A vendor's covenants for title are, as we have seen, generally limited to the acts of himself, his ancestors and testators, (if he have taken the estate otherwise than by purchase,) and persons claiming by, through, under or in trust for him or them respectively ; it, however, frequently happens either that some of the covenants are general and others limited, or that the limited covenants are not consistent in their restrictions ; in such cases questions arise as to how far the restrictions in one covenant affect another.

Covenants for title, how restricted.

A covenant, general in terms will be so construed, unless a contrary intention clearly appear (*a*) : this, however, may be evidenced by any part of the instrument (*b*).

Only by clearly expressed intention.

Before considering the effect of restrictive words in the covenants themselves, we may remark, that the five usual covenants may be divided into three classes, having distinct objects ; viz., first, the covenants for seisin and right to convey, which are strictly covenants for title ; secondly,

Covenants for title, how classified.

X

(*u*) *Taylor v. Debar*, 1 Ch. Ca. 274.

(*v*) Sug. 460.

(*w*) *Napper v. Lord Allington*, 1 Eq. Ca. Ab. 166.

(*x*) *Ibid*.

(*y*) *Bennet's case*, Cro. Eliz. 9.

(*z*) See Sug. 769.

(*a*) See Sug. 755.

(*b*) See 2 Bos. & P. 22, 25.

Chap. XIV. the covenants for quiet enjoyment, and *that* free from incumbrances, (not a covenant that the estate *is* free from incumbrances, but merely that there shall be no disturbance by incumbrancers); and thirdly, the covenant for further assurance: and that the first class may be broken without there being any breach of the second or third; for the purchaser, although not acquiring a marketable title, may be undisturbed in the possession, and may never require any further assurance, or may obtain what he does require: also that, if either of the second class be broken (unless it be so worded as to extend to wrongful disturbances), there must have been a breach of the first class: and lastly, that the covenant for further assurance may be broken without there being any breach of either of the other classes.

Restrictive words, effect of: Sir E. Sugden's propositions respecting;

Upon this subject the four following propositions are laid down by Sir *E. Sugden*; viz., first, that "where restrictive words are inserted in the first of several covenants having the same object, they will be construed as extending to all the covenants, although they are distinct" (c); secondly, that "where the first covenant is general, a subsequent limited covenant will not restrain the generality of the preceding covenant, unless an express intention to do so appear, or the covenants be inconsistent" (d); thirdly, that "as on the one hand a subsequent limited covenant does not restrain a preceding general covenant, so, on the other hand, a preceding general covenant will not enlarge a subsequent limited covenant" (e); and fourthly, that "where the covenants are of divers natures, and concern different things, restrictive words added to one shall not control the generality of the others" (f).

how far

(c) Sug. 756.

(d) *Ib.* 759.

(e) *Ib.* 761.

(f) Sug. 762; and see *Young v. Raincock*, 7 C. B. 310; *Crossfield v. Morrison*, 13 Jur. 565.

nection with the above classification of the covenants and of their separate objects, seems to be warranted by the authorities (*g*): the second proposition, (which together, or rather as connected, with the first, is disputed by the learned Editor of Mr. *Jarman's* work on conveyancing) (*h*), is, perhaps, hardly accurate; for, although a prior general covenant, will not, it appears, be restrained by a subsequent limited covenant having a different object (*i*), yet where two covenants relate to the same object, restrictive words in the second may, it seems, control the generality of the first (*k*): the third and fourth propositions seem to be unimpeachable.

Chap. XIV.
maintain-
able.

And, of course, restrictive words occurring in one covenant may extend to another, if the grammatical connection of the two require, and no inconsistency would result from, such a construction (*l*): "and the Court will endeavour to ascertain the intention of the parties from an attentive consideration of the whole deed, or construe the covenants either as independent or as restrictive of each other, according to such apparent intention" (*m*).

Grammatical construction generally determines connection of covenants.

Upon the death of a covenantee, or other person entitled to the benefit of covenants for title which run with the land, and have been broken in his lifetime, the right of action, so far as any actual damage has been

Whether real or personal representative of covenantee may sue for breach.

(*g*) See *Nervin v. Munns*, 3 Lev. 46; *Browning v. Wright*, 2 Bos. & P. 13; *Foord v. Wilson*, 2 J. B. Moore, 592; as controlled by *Howell v. Richards*, 11 East, 633; *Stannard v. Forbes*, 6 Ad. & E. 572.

& P. 565; *Saward v. Anstey*, 10 J. B. Moo. 55; see also *Martyn v. M'Namara*, 4 Dru. & W. 411, where Sir E. Sugden, C., appears to have considered that a general covenant with A. might be cut down by restrictive words in a covenant entered into upon the same subject-matter with B. upon the same instrument.

(*h*) Vol. ix. p. 383.

(*i*) *Barton v. Fitzgerald*, 15 East, 530; *Gainsford v. Griffith*, 1 Saund. 58 i.; *Smith v. Compton*, 3 B. & Ad. 189.

(*l*) *Broughton v. Conway*, Dy. 240; *Peles v. Jervies*, Dy. 240, n.; and see 6 Ad. & E. 587; *Rich v. Rich*, Cro. Eliz. 43.

(*k*) See *Nind v. Marshall*, 3 J. B. Moore, 703, 717; but not necessarily, see *Hesse v. Stevenson*, 3 Bos.

(*m*) 1 Saund. R. n. p. 60.

Chap. XIV. sustained by him, belongs to his executors or administrators (*n*) ; but, except to the extent of such actual damage, the right to sue descends with the land, if freehold or copyhold, to the heir or devisee (*o*) ; or, if leasehold, to the executors or administrators ; or, (if specifically bequeathed), to the legatee, (after their assent to the bequest).

Customary
heir may sue
before
admittance,
semble.

And the customary heir of a copyholder might, it is conceived, sue upon the covenants before admittance ; “ being a complete tenant against all persons but the Lord ” (*p*).

Damages,
what
amount of
recoverable
where no
eviction.

Where the title is defective, and an action is brought upon the covenants before eviction, there seems to be no general rule by which the amount of damages should be determined ; where the purchaser has acquired an indefeasible estate, but of a less extent than that which he contracted for, the amount, (if he choose to retain the estate,) would seem to be, the difference between the estimated values of the two estates ; as if, for instance, the land prove to be copyhold instead of freehold (*q*) : Sir *E. Sugden* seems to consider (*r*) that where the title is defective within the covenant, the purchaser, before eviction, may offer to re-convey the estate and claim the entire purchase-money ; but no authority is cited for this proposition : at any rate, if an action were brought before eviction,—unaccompanied by an offer to re-convey,—it seems that the entire value could not be recovered ; unless, perhaps, the alleged breach consisted in a refusal by the defendant to perfect the title (*s*).

What

Where there has been actual eviction, the purchaser

(*n*) *Lucy v. Levington*, 2 Lev. 26.

(*q*) *Gray v. Briscoe*, Noy, 142 ;

(*o*) *Kingdon v. Nottle*, 1 Mau. & S. 355 ; *King v. Jones*, 5 Taunt. 418.

see *Wace v. Bickerton*, 19 L. J. 254, Ch.

(*r*) Sug. 765.

(*p*) Scriv. on Cop. 290.

(*s*) See 5 Taunt. 428.

may recover interest, under the name of damages, for the time during which he has been out of possession (*t*) : upon the same principle, he would be entitled to interest upon any charge on the estate which he had been compelled to satisfy : it seems, however, to be doubtful whether he could recover it for such period as he had, without reasonable excuse, neglected to sue upon the covenant (*v*). So if he, without communicating with the vendor, compromise an adverse claim or suit, he may recover the amount paid by him, and his costs of suit as between attorney and client, subject only to the right of the vendor to show, either that the claim was wholly or in part unfounded, or that better terms might have been procured (*w*) : and it would appear that, if the vendor, upon notice given to him of a suit within the terms of his covenant for quiet enjoyment, refuse to defend it, he could not, as against the purchaser, dispute the validity of the claim (*x*) : it does not, however, appear, that the latter could safely defend an action without giving notice to the vendor or the party liable upon his covenants (*y*), and obtaining his directions, if the defence is apparently hopeless (*z*). It seems doubtful whether, in any case, the purchaser could recover the expenses of improvements, although stated as special damages in his declaration (*a*) ; but there may, perhaps, be a difference between improvements consisting in additions to the property,—*e.g.*, expensive building erected upon the land,—and mere improvements of the land itself (*b*).

Chap. XIV.

amount of
recoverable
where there
is eviction.

Moneys paid
by way of
compromise,
and costs,
when re-
coverable.

Not sums
expended in
improve-
ments.

A certificate in bankruptcy has been held to be no Bankruptcy

(*t*) *King v. Jones*, 5 Taunt. 418 ; *Peake*, 7 Taunt. 153.
see 422.

(*v*) See *Anderton and another v. Arrowsmith*, 2 P. & D. 408. & M. 406 ; *Short v. Kalloway*, 11 Ad. & E. 28.

(*w*) *Smith v. Compton*, 3 B. & Ad. 189, and 407. (*a*) *Lewis v. Campbell*, 3 J. B. Moore, 35.

(*x*) See *Duffield v. Scott*, 3 D. & E. 377. (*b*) See 3 J. B. Moore, 52, 54, 57.

(*y*) See 3 B. & Ad. 408 ; *Lewis v.*

Chap. XIV.
and certifi-
cate were no
defence to
action.

Formerly
no action of
covenant,
against
devisee.

defence to an action for breach of covenants for title happening before the bankruptcy, the demand not being a liquidated debt (*c*).

If the covenantor died before the 16th July, 1830, no action for a breach of covenants for title would lie against his devisee (*d*); whether the breach occurred before (*e*) or after the decease; but if the covenant had been for payment of a sum by way of liquidated damages, and "heirs" were named in the covenant, the devisee would have been liable, jointly with the heir, in respect of a breach occurring in the lifetime of the covenantor (*f*); although, if there were no heir no action would lie against the devisee alone (*g*); the heir, if named in the covenant, is liable to the amount of descended assets, whether the breach occur before or after the death of the covenantor (*h*).

Alteration
effected by
1 Will. IV.
c. 47.

And under the 1 Will. IV. c. 47 (*k*), devisees are, to the extent of the devised assets, rendered liable to be sued upon the covenants of their testators, jointly with the heir taking assets by descent, or solely if there be no such heir.

Damages for
breach of
covenant
when claim-
able as debt
in adminis-
tration suit.

And it has been held, in a recent case (*l*), that damages upon covenants for title, in which the heir was named, for breaches happening after the covenantor's decease, will, even as against the devisee, be considered as within the meaning of a testamentary charge of *debts*; but the devisee, or (it is conceived) the heir, in an administration suit, is not bound by the result of proceedings by the

(*c*) *Hammond v. Toulmin*, 7 Durn. & E. 612; but see now and consider, 12 & 13 Vict. c. 106, s. 188.

(*d*) *Wilson v. Knubley*, 7 East, 128.

(*e*) *S. C.*

(*f*) See *Jenkins v. Briant*, 6 Sim. 603, 607.

(*g*) *Hunting v. Sheldrake*, 9 M. & W. 256.

(*h*) See *Shep. Touch.* 177.

(*k*) See ss. 2, 3, 4, and 8. The

Act came into operation on the 16th July, 1830.

(*l*) *Morse v. Tucker*, 5 Ha. 79; *Birmingham v. Burke*, 2 J. & L. 699, and it appears to have been held, in another recent case, that a claimant for unliquidated damages under a breach of covenant, may himself institute a suit for the administration of the covenantor's estate: *Burch v. Coney*, 14 L. T. 414.

covenantee against the personal representatives of the covenantor, but may have the question determined in an action to which he is himself a party (*m*): nor can interest be claimed prior to the amount of damages being so determined: but where devisees, having insisted on this right, were unsuccessful in the action, the covenantee was allowed the amount of the damages assessed upon the trial, his costs of defending the ejectment upon which he had been evicted, of an action brought by him against the personal representatives of the covenantor and by the result of which the devisees had refused to be bound, of the action to which the devisees were parties, and of the suit in Equity, and also interest on the damages and costs, to be computed from the time when the amount was ascertained and judgment entered up in the action against the devisees (*n*).

A remainderman has no equitable claim upon damages recovered by the tenant for life upon breach of covenants for title (*o*), as he himself can bring an action for the injury (if any) sustained by him as owner of the reversion.

No apportionment of damages between tenant for life and remainderman.

Where a bill was filed to set aside a conveyance as fraudulent, and the defendant, *pendente lite*, sold parts of the estate and died, and a supplemental bill was filed against his representatives and the purchasers, the latter, being evicted, were held entitled in the suit to repayment of their purchase-money by his representatives; and, as against the plaintiff, to an allowance for lasting repairs and substantial improvements (*p*).

The rights arising under a vendor's covenants, (other than covenants for title,) appear to be subject to the same

Purchaser's remedies on vendor's covenants

(*m*) *Morse v. Tucker*, *ubi supra*;
and see *Cox v. King*, 9 Beav. 530;
Norman v. Stibby, 9 Beav. 560.

(*o*) *Noble v. Cass*, 2 Sim. 343.
(*p*) *Trevelyan v. White*, 1 Beav.
588.

(*n*) 5 Ha. 79.

Chap. XIV. rules as have been already considered with reference to a
 other than purchaser's covenants (*q*).
 for title.

(6.) *Purchaser's remedy in Equity, under special circumstances, if title prove defective.*

Purchaser
 accepting
 defective
 title through
 fraud of
 vendor,
 relieved in
 Equity.

A purchaser, after conveyance and payment of his purchase-money, may obtain relief in Equity against a vendor, who, by fraudulent misrepresentation, has induced him to accept a defective title (*r*) ; nor need he wait until eviction, but may, at once, claim to have the contract rescinded (*s*) : even a fraudulent concealment, by the vendor, of a material fact which the purchaser had no means of discovering, might lead to the same result (*t*). So, in a modern case, where a purchaser in possession was fraudulently induced by the vendor and his solicitor, in the absence of his own professional adviser, to pay the purchase-money and execute covenants for the production of title deeds, while the title to part of the property was under investigation with reference to a known defect, he was held entitled to rescind the contract, to recover his purchase-money with his costs, charges and expenses, and to have the deeds of covenant delivered up to be cancelled (*u*). So, where a vendor, seemingly from mere mistake, erroneously stated that a will, forming part of the title, had

(*q*) *Vide supra*, p. 360, and authorities cited ; and see *Brewster v. Kitchin* or *Kidgil*, Ld. Raym. 317, 322 ; and 5 Mod. 369 ; and *Holmes v. Buckley*, 1 Eq. Ca. Abr. 27 ; and the remarks on these decisions in Smith's Leading Cases, 32, *et seq.*

(*r*) *Edwards v. M'Leay*, G. Coop. 308, 312 ; 2 Swanst. 287 ; *Berry v. Armistead*, 2 Keen, 221 ; *Roddy v.*

Williams, 3 J. & L. 1 ; see *Jillard v. Edgar*, 13 Jur. 1114.

(*s*) G. Coop. 318 ; 2 Keen, 221.

(*t*) See G. Coop. 312 ; *Early v. Garrett*, 4 M. & R. 687, 690 ; and see 2 Y. & C. C. C. 577 ; and the judgment in *Small v. Attwood*, You. 455.

(*u*) *Berry v. Armistead*, 2 Keen, 221.

been proved, the purchaser, after conveyance, obtained a decree that the will should be deposited with the Master, and the vendor was fixed with costs (*v*). Chap. XIV.

In a recent case, where a public way over the estate had been so blocked up under a mere temporary arrangement that it could not be discovered by the purchaser, and the vendor's solicitor, (she herself having no personal knowledge of its existence,) omitted to disclose the same, but not, as the Court considered, "with any intention to do or sanction anything he thought wrong," and the conditions of sale required the purchaser to build a wall which in fact interfered with such right of way, it was held, that this was such implied fraud on the vendor as enabled the Court to decree a reconveyance (*w*): the bill, however, which rested the purchaser's case upon the ground of personal fraud, was, on appeal, dismissed by the Lords (*x*); they being of opinion that she had no actual knowledge of the circumstances, and that the agent's knowledge could not sustain a charge of personal fraud against the principal; and that the plaintiff, putting his case on the ground of personal fraud, could not rest it on any other ground: and Lord *Cottenham* cited, and seemed to approve of, a case (*y*), where a lessor having informed his intended lessee, (in answer to an inquiry on the point,) that no public right of way existed over the estate, a bill to rescind the executed lease on the ground of the ascertained existence of such right of way, was dismissed, there having been no wilful misrepresentation.

Vendor how far responsible for his agent.

Purchaser must show wilful misrepresentation, *semble*.

It may be remarked of one of the last two cases (*z*), that the misrepresentation evidently resulted from mere care-

(*v*) *Harrison v. Coppard*, 2 Cox, 605.

318. (*y*) *Leyge v. Croker*, 1 B. & B.

(*w*) *Gibson v. D'Este*, 2 Y. & C. C. 506.

C. 512. (*z*) *Gibson v. D'Este*, *ubi supra*.

(*x*) *Wilde v. Gibson*, 1 H. L. Ca.

Chap. XIV.

lessness in not ascertaining whether certain mark-stones denoted the centre or the side of the way; and, of the other (*a*), that the lessor had grounds for believing his statement to be correct: in each case the misrepresentation, if discovered in time, would probably have been a sufficient reason for refusing to complete the contract; but, as observed by Lord *Cottenham* (*b*), there is a marked distinction made by Courts of Equity between what is necessary to resist a suit for specific performance of a contract, and what is necessary to support a suit to set aside a deed executed and an arrangement completed. It seems that, in such cases, the principal would, as a general rule, be bound by the fraud of the agent (*c*); but not by his mere non-communication of his constructive knowledge, or of knowledge acquired by him otherwise than as agent (*d*).

Principal
bound by
fraud of
agent.

Terms on
which pur-
chaser is
relieved in
Equity

Where a re-conveyance is decreed, the purchaser, it appears, will be credited, in addition to his purchase-money, not only with necessary outgoings in respect of the estate, but also with the amount of repairs and improvements, if executed before the discovery of the defect in title, and if their repayment is specially prayed by the bill (*e*); and, probably, of necessary repairs executed during or pending litigation, if specially prayed (*f*): he will also be allowed his costs of the purchase and conveyance (*g*), and interest upon all these several sums at the rate of 4*l.* (*h*) *per cent.* from the times of their respective payments or expenditure; and will be debited with such rents and profits as he has, or without wilful default (*i*)

(*a*) *Legge v. Croker*, *ubi supra*.

(*b*) *Vigers v. Pike*, 8 Cl. & Fin.

645.

(*c*) See *Wilson v. Fuller*, 3 Q. B. 68, 77; Sug. 274; 1 H. L. C. 615.

(*d*) *Wilde v. Gibson*, 1 H. L. Ca. 605; and see *Alvanley v. Kinnaird*, 2 Mac. & G. 1, 6.

(*e*) See *Edwards v. M'Leay*, 2 Sw.

289.

(*f*) See Sug. 279.

(*g*) 2 Sw. 289. See the decree.

(*h*) See 2 Y. & C. C. 581; 5*l. per cent.* was formerly allowed, see *Jac.* 166.

(*i*) See the decrees in *Gibson v.*

might have, received; and with an occupation rent in respect of any part of the estate which has been in his own possession (*k*): he would also, it is conceived, be compelled to reinstate premises which he has materially altered; *e. g.*, a private house converted into a shop (*l*): where a purchase was set aside for fraud on the part of the purchaser, and the rents exceeded the interest of the purchase-money, annual rests were directed until the principal should be liquidated (*m*).

(7.) *As to purchaser's right to pay off incumbrances out of the unpaid purchase-money.*

After the conveyance has been executed, the purchaser may (*n*) discharge, out of any purchase-money which remains unpaid, (although secured,) any incumbrances which either have been created by the vendor himself, or are covered by his covenants for title; but not incumbrances paramount to his title, and not covered by his covenants (*o*): and this right, it is conceived, would not, where security has been given for the purchase-money, prevail, as against an assignee, for valuable consideration and without notice, and who, previously to taking the assignment, had ascertained from the purchaser the existence of the debt; otherwise, no one could safely take a transfer of a mortgage by a purchaser to a vendor for securing part of the purchase-money: the case seems to be within the principle of one where it was decided, that, where a tenant for life with power of sale had sold an estate, and covenanted that it was free from incumbrances, and the money had been paid to the trustees of the settle-

Whether he can, after conveyance, retain incumbrances out of unpaid purchase-money

D'Este, 2 Y. & C. C. C. 581; and *Murray v. Palmer*, 2 Sch. & Lcf. 490; but see, *contra*, the judgment, *ibid.* 489.

(*k*) See 2 Y. & C. C. C. 581.

(*l*) See Jac. 165.

(*m*) *Donovan v. Fricker*, Jac. 165.

(*n*) See *Serjeant Maynard's case*, Freem. Ch. R. 1.

(*o*) *Thomas v. Powell*, 2 Cox, 394.

Chap. XIV.

ment and invested, the purchaser, on discovering the existence of incumbrances, had no claim upon the vendor's life-interest in the money as against an annuitant, to whom, for valuable consideration, and without notice of the fraud committed by the vendor, the trustees of the stock had, at the vendor's request, given an irrevocable power of attorney to receive the dividends (*p*) : and Lord *Thurlow*, on appeal, intimated an opinion, (which however was extra-judicial,) that (irrespective of the claim of the annuitant) the purchaser could not have followed the money when deposited with the trustees ; the case is cited by Sir *E. Sugden* as an authority for the proposition that, notwithstanding incumbrances have been fraudulently concealed, "the purchaser has no lien on the purchase-money after it is appropriated by the vendor" (*q*).

(8.) *Purchaser's remedy in Equity if he buy his own estate—or if lands are omitted from conveyance—and as to further assurance in Equity and by Statute.*

Purchaser
buying his
own estate,
relieved in
Equity.

If it appear that the estate belonged to the purchaser, he can, in Equity, recover his purchase-money, although there was no fraud on the part of the vendor, and although the purchaser might have discovered his right from the abstract of title (*r*).

Whether so
if he buy es-
tate which
has no
existence.

And it has been held (*s*), that a purchaser who, without any fault on the part of the vendor, buys an estate which in fact has no existence, (*e. g.*, a remainder expectant on an estate tail which has been barred,) can obtain relief in Equity ; but the case seems to be considered by Sir *E. Sugden* as of doubtful authority (*t*).

Purchaser

If lands shown to a purchaser are excepted in the con-

- | | |
|---|---|
| (<i>p</i>) <i>Cator v. Lord Pembroke</i> , 1 | 126. |
| Bro. C. C. 301. | (<i>s</i>) <i>Hitchcock v. Giddings</i> , 4 Pr. |
| (<i>q</i>) Sug. 687. | 135. |
| (<i>r</i>) <i>Bingham v. Bingham</i> , 1 Ves. | (<i>t</i>) See Sug. 272. |

veyance under a name by which he did not know them, he can claim them in Equity; and by getting in an outstanding legal estate may hold them, even as against a subsequent purchaser for valuable consideration and without notice (*u*); and he could, doubtless, enforce a conveyance of them, as against the vendor, or volunteers: he has also, it would appear, the same rights as respects lands accidentally omitted from the conveyance, if shown to him as part of his purchase (*w*), or if he can prove an agreement for their purchase sufficient within the Statute of Frauds (*x*): and, as a general rule, where the conveyance is executed for the purpose of giving effect to and executing the agreement, and by fraud, accident, or mistake, it gives to the purchaser less than he is entitled to under the agreement, he may call upon the Court to rectify the defective conveyance, and give him all that the agreement comprehended; but where the original agreement is of doubtful construction, and the conveyance is definite and unequivocal, it is not easy to avoid the conclusion that the latter may be the best evidence of the actual agreement (*y*).

So, also, he may in Equity, under the covenant for further assurance, require the vendor to perfect a defective title, even by conveying any interest in the estate which he may have subsequently acquired for valuable consideration (*z*); and the right seems to exist independently of such a covenant (*a*); and may be enforced against the vendor's representatives, and parties claiming under him

Chap. XIV.
may claim
in Equity
lands shown
to him, or
accidentally
omitted.

May require
vendor to
convey sub-
sequently
acquired
interests.

(*u*) *Oxwick v. Brockett*, 1 Eq. Ca. Abr. 355.

(*w*) See *Cass v. Waterhouse*, Prec. Ch. 29.

(*x*) *S. C.*; and see *Nelson v. Nelson*, Nels. Ch. R. 7, which, however, was a case between principal and agent.

(*y*) *Per V. C. Wigram, Humphries v. Horne*, 3 Ha. 277, 278.

If the purchaser's bill in such a case is dismissed, and purchase-money has been paid by him into Court, and not invested, he must pay interest upon it to the vendor, although it has been unproductive, *S. C.*

(*z*) *Taylor v. Debar*, 1 Ch. Ca. 274.

(*a*) See 3 Sim. 116; *Seabourne v. Powel*, 2 Vern. 11.

Chap. XIV. for valuable consideration with notice (*b*); and the rule seems to be the same even when he has no estate in the land at the date of the conveyance: it was, however, decided in an old case (*c*), that such an equity could not be enforced against the heir, but there seems to be no good ground for such a distinction, and it has been judicially disapproved of by Sir *E. Sugden* (*d*).

In *Noel v. Bewley* (*e*), a man conveyed his contingent remainder in fee by way of mortgage, and covenanted for further assurance; and the remainder having been destroyed by his mother, the tenant for life, (who was also the reversioner in fee,) he was held liable in Equity to perfect the security out of an interest in the estate which he took under her will: so, where a man who was supposed to have a reversion in fee, but in fact had no estate in the land, executed what purported to be a conveyance of the same for valuable consideration, he was held liable, under his covenant for further assurance, to convey the estate on its subsequently coming to him as heir at law (*f*): the cases seem, as observed by Sir *E. Sugden*, C. (*g*), "to establish this, that if a man sells an estate, and the title is afterwards defeated, but subsequently he acquires the same lands under another title, there is an equity arising out of the contract to fasten it upon the new title:" but, in applying this rule, the word *estate* must be strictly construed, for evidently no such equity could exist where the contract had been for the purchase professedly of a contingent interest at a price fixed with a view to the contingency.

It seems probable that the purchaser could come into Equity for further assurance, even if the conveyance were

Although
the sale
were of a
mere ex-

(*b*) *Jennings v. Blincorne*, 2 Vern.
609.

(*c*) *Morse v. Faulkner*, 1 Anst. 11.

(*d*) See 1 Dru. & W. 159.

(*e*) 3 Sim. 103.

(*f*) *Smith v. Baker*, 1 Y. & C. C.
C. 223.

(*g*) See *Jones v. Kearney*, 1 Dru.
& W. 159.

by a mere expectant heir professedly selling the estate in the lifetime of his ancestor (*h*). Chap. XIV.

A conveyance by lease and release, containing no precise recital of the vendor's seisin, but only a recital that he is "legally or equitably entitled to the property," cannot operate by way of estoppel so as to pass the after-acquired legal estate (*i*). pectancy
semble.
No estoppel
by doubtful
recital.

Where a voidable estate has, either before or after the passing of the 3 & 4 Will. IV. c. 74, been created by a tenant in tail in favour of a purchaser for valuable consideration, any subsequent assurance under the Act, (other than a lease not requiring enrolment,) whatever may be its object or the extent of estate intended to be thereby created, confirms the previous voidable estate to the extent to which the tenant in tail alone, or the tenant in tail with the consent of the protector, (if there be one, and he consent to such subsequent assurance,) could confirm the same under the Act: but this is not to affect any purchaser for valuable consideration, to whom such subsequent assurance may be made without express notice of the previous voidable estate (*k*); so, before the Act, a Fine by a tenant in tail confirmed his previous voidable conveyance (*l*). Voidable
estate
created by
tenant in
tail; con-
firmation of
by subse-
quent assu-
rance.

(*h*) See Sug. 1023; 1 Fonb. on Eq. b. i. ch. 4, s. 2; *Wethered v. Wethered*, 2 Sim. 183; *Harwood v. Tooke*, 2 Sim. 192; but see *Carleton v. Leighton*, 3 Mer. 667; *Jones v. Roe*, 3 Durn. & E. 93; an equitable charge upon an expected legacy was recently supported in *Bennett v. Cooper*, 9 Beav. 252.

(*i*) *Right v. Bucknell*, 2 B. & Ad. 278; and see Sug. 1018, 1023; and *Lloyd v. Lloyd*, 4 Dru. & W. 354; *sed aliter*, if there be a particular recital of title, *Bensley v. Burdon*, 2 Sim. & St. 519; on

appeal, 8 L. J., Ch. 85; this case is said to be overruled by *Right v. Bucknell*, see 4 Dru. & W. 369, *sed qu*.

(*k*) 3 & 4 Will. IV. c. 74, s. 38: and see as to bankruptcy of a tenant in tail who has created a voidable estate, sect. 62 of Act; and see as to confirmation of the voidable estates of purchasers under the bankruptcy of a tenant in tail, sects. 60, 61, and 65 of Act; and 12 & 13 Vict. c. 106, sect. 208.

(*l*) *Lloyd v. Lloyd*, 4 Dru. & W. 354.

Chap. XIV.

(9.) *As to the general rights and liabilities of purchaser under the conveyance.*

Purchaser's
right to
rent, if prop-
erty in
lease, &c.

If the conveyance be executed during the existence of a tenancy, the purchaser of the reversion thereupon becomes entitled to the accruing (*m*) and future rent, and may recover it by action, or (after giving notice of the conveyance) by distress (*n*); but he cannot recover arrears due before the conveyance (*o*), or subsequent rent which the tenant, in ignorance of the conveyance, has paid to the vendor (*p*): so, it would appear, the purchaser of a part only of a rent-charge, may, after conveyance, distrain for his proportionate part (*q*). The Act for the apportionment of rents (*r*) does not appear to apply to the case of a sale, or, as between a vendor and purchaser, to affect the latter's right to accruing rents (*s*).

And to sue
for breach of
covenant.

So, if the tenancy be under a lease by deed (*t*) for a term which is subsisting at the date of the conveyance, the purchaser of the reversion may sue upon breaches of covenants which occurred before the conveyance (*u*); but not, it would seem, if the lease be determined before the conveyance, although the tenancy continue (*w*): his right to sue exists although he have purchased the reversion only of part of the demised premises (*x*); but he then cannot enter for conditions broken (*y*); but such entry may be made by the purchaser of part of the reversion of all the pre-

As to re-
entry.

(*m*) *Flight v. Bentley*, 7 Sim. 149.

(*n*) *Moss v. Gallimore*, Doug. 266, although the rent was due at the date of the notice.

(*o*) *Flight v. Bentley*, 7 Sim. see p. 151.

(*p*) 4 Anne, c. 16, s. 10; *Birch v. Wright*, 1 Durn. & E. see 385.

(*q*) *Rivis v. Watson*, 5 M. & W. 255.

(*r*) 4 & 5 Will. IV. c. 22.

(*s*) See and consider *Browne v. Amyot*, 3 Ha. 173.

(*t*) *Standen v. Christmas*, 10 Q. B. 135.

(*u*) Sugd. 219.

(*w*) See *Johnson v. St. Peter's, Hereford*, 6 Nev. & M. 106, 115.

(*x*) *Twynam v. Pickard*, 2 B. & Ald. 106.

(*y*) *Wright v. Burroughes*, 4 D. & L. 438; see p. 448.

mises; *e. g.*, if a termor underlet to A., and then assign to B. the original term wanting one day, B. may enter for condition broken by A. (z): and in none of the above cases is it necessary that the tenant should attorn to (a), or otherwise acknowledge the title of, the purchaser: where the lease is by writing not under seal, the right to sue upon it as a contract does not pass with the reversion, and the lessor may, after conveying the reversion, sue the lessee in respect of breaches of agreement, (*e. g.* to repair the premises,) committed during the tenancy but subsequently to the conveyance of the reversion (b); but the assignee of the reversion may maintain *assumpsit* against the tenant for use and occupation (c).

Chap. XIV.

And, under a recent Act, where the immediate reversion on a lease is surrendered or merged, the next estate is to be deemed the reversion as respects both rights and liabilities (d).

next estate
is now the
reversion.

And where the purchaser is himself lessee, the execution of the conveyance at once determines all the covenants in the lease which subsisted between himself and the vendor as lessee and lessor (e).

Purchaser's
rights and
liabilities, as
lessee, cease
on con-
veyance.

It has been held, that the mere retention by the vendor, of the actual possession of the property, subsequently to the execution of the conveyance, will not subject him to an action by the purchaser for use and occupation (f).

Vendor re-
taining
possession,
not liable
for use and
occupation.

We have seen (g) that, under the old law, where a testator, having entered into a contract for purchase which was not binding on the vendor, devised the estate, such devise was inoperative on any interest which he subsequently acquired in the property; although a case of

Purchaser's
will, how
affected by
conveyance.(z) *S. C.*(c) *S. C.*(a) See 4 Anne, c. 16, sect. 9;
Doug. 269.

(d) 8 & 9 Vict. c. 106, s. 9.

(e) 1 Bli. 69.

(b) *Bickford v. Parson*, 5 C. B.
920; *Standen v. Christmas*, 10 Q. B.
135.(f) *Tew v. Jones*, 13 M. & W.

12.

(g) *Supra*, 126.

Chap. XIV. election might, in some cases, be raised against the heir : so, also, if, having contracted for an estate, he devised it, and then took a conveyance in terms inconsistent with the contract, the devise was thereby revoked ; but that a devise contained in a Will coming within the provisions of the recent Act of 1 Vict. c. 26, will pass to the devisee the rights of the testator, whatever they may be, under the subsequent conveyance.

Conveyance of equitable estate, why requisite.

As we have already seen, even in the case of a mere equitable estate, a conveyance is necessary to enable the purchaser to enforce, as against third parties, any equities attaching to the property (*h*).

Conveyance with power of redemption,—when not a mortgage.

And we may here remark, that if a *bonâ fide* sale and absolute conveyance are accompanied by a power reserved to the vendor to repurchase the property, this will not turn the transaction into a mortgage, if such does not appear to have been the intention of the parties ; and the test of such intention seems to be the existence or non-existence of a debt from the original vendor in respect of the sum named as the price for such repurchase : if there is no debt there is no mortgage (*i*).

(*h*) See *Tasker v. Small*, 3 M. & C. 70 ; *per* Lord Cottenham, *supra*, p. 115.

(*i*) See *Perry v. Meddowcroft*, 4 Beav. 197, affirmed, 203 ; *Williams v. Owen*, 5 M. & C. 303.

CHAPTER XV.

Chap. XV.

AS TO THE EFFECT OF THE CONVEYANCE ON THE ADVERSE
RIGHTS OF THIRD PARTIES.

1. *Purchaser without notice, protected by legal estate against prior claimants.*
2. *With mere equitable title, postponed to prior equitable claimants.*
3. *How far protected against defective execution of powers—against prior claimants who have encouraged him to purchase—and by Statute in various cases.*
4. *As to priority under the Registration Acts.*
5. *As to notice—what it is—how it may be proved—and its effect—of void or voidable estates, and fraudulent or voluntary conveyances—equitable relief against purchasers with notice.*
6. *As to contribution to paramount charges.*
7. *Rights of third parties after conveyance in various cases.*

(1.) WHERE two persons have, in conscience, an equal claim to the same property, Equity will not interfere against the one who acquires a legal right to hold it; even although his equitable title be of later date than that of his opponent (a).

Where Equities are equal, legal estate prevails.

The execution of a conveyance vesting the legal estate in a *bonâ fide* purchaser for valuable consideration, or in his trustee, will, therefore, render his title indefeasible as against all equitable claimants, even for valuable considera-

Purchaser without notice, paying purchase-money and acquiring legal estate

(a) *Oxwick v. Plumer*, Bac. Abr. Mortgage, E, s. 3.

Chap. XV.
under the
conveyance,

or getting it
in by deed
subsequent
to convey-
ance, ac-
quires in-
defeasible
title.

Although
vendor had
no title in
equity.

But notice
of another
having bet-
ter right to

tion, of whose claims he had no notice prior to the execution of the conveyance (*b*), and actual payment of the purchase-money (*c*): and where the contract has been completed by a conveyance which proves defective, by reason of some prior conveyance, charge, or incumbrance, the purchaser may, at any subsequent period, get in any outstanding legal estate, (unless held expressly in trust for an adverse claimant (*d*),) and use it against all parties of whose claims he had no notice at the time of the completion of his purchase (*e*): where the conveyance is executed and the purchase-money is secured, he may come into Equity to have it employed in discharge of newly discovered incumbrances (*f*), if created by the vendor or covered by his covenants for title (*g*); and where the conveyance has been executed, and part only of the money paid, before notice, he may, it is conceived, clearly avail himself of the legal estate as a security to the extent of the sum so paid.

And, for the above purposes, it is immaterial that the vendor has no equitable interest in the property:—a bare trustee, or a vendor whose apparent equitable title depends upon a forged instrument (*h*), can make a good title to a purchaser paying his money without notice, and then, or subsequently, acquiring the legal estate.

But the legal estate will not protect a purchaser against the claims of persons whose prior right to its protection

(*b*) *Wigg v. Wigg*, 1 Atk. 382, 384.

(*c*) *Tourville v. Naish*, 3 P. Wms. 307; (where the money being secured by bond was held insufficient;) *Jones v. Stanley*, 2 Eq. Ca. Abr. 685, pl. 9; *Story v. Lord Windsor*, 2 Atk. 630; see *Davies v. Thomas*, 2 Y. & C. Exch. 234.

(*d*) *Saunders v. Dehew*, 2 Vern. 271.

(*e*) *Stanhope v. Earl Verney*, 2 Ed. 81; and Mr. Butler's note to Co. Litt. 290. b. n.; *Willoughby v. Willoughby*, 1 Durn. & E. 763; and see *Jones v. Smith*, 1 Ha. 43; and 1 Ph. 244; as to the priority acquired by registration, *vide infra*.

(*f*) 3 P. Wms. 307.

(*g*) *Supra*, 381.

(*h*) See *Jones v. Powles*, 3 M. & K. 581.

was known to him before the completion of the purchase, even although the *extent* of such claims were unknown; for instance, where A., knowing that B. had a charge on the property, accepted a mortgage of the estate, relying on the mortgagor's covenants, and then got in an old outstanding term for years, it was held, that B., having, in respect of A.'s notice of the first incumbrance, a preferable right to require an assignment of the term, was entitled to priority not only in respect of such first incumbrance, but also in respect of a subsequent charge of which A. had no notice at the date of his advance (*i*).

Chap. XV.
call for legal
estate, is
notice of all
his equities.

And it seems that a purchaser who has completed without notice of a prior incumbrance, may get in the legal estate even from a trustee or satisfied mortgagee having notice of such incumbrance, and will be entitled to avail himself of its protection (*k*): yet it has been doubted whether the trustee or mortgagee can safely make the conveyance (*l*): and if the trustee have executed a declaration of trust in favour of the incumbrancer, and the purchaser have notice of such declaration at the time of getting in the legal estate, he will lose the benefit of its protection (*m*).

Whether
legal estate,
got in from
trustee who
has notice of
prior claim,
is available.

But it is clear that a purchaser by paying off, and getting in a legal estate from, an unsatisfied mortgagee, may hold it as against all mesne incumbrances of which he had no notice at the time of completion; and this may be done *pendente lite*, at any time before a decree to settle priorities (*n*).

Legal estate
got in from
unsatisfied
incumbran-
cer, avail-
able against
subsequent
incumbran-
cers.

(*i*) *Willoughby v. Willoughby*, 1 D. & E. 763.

parte Knott, 11 Ves. 613.

(*k*) See Lord Hardwicke's judgment in *Willoughby v. Willoughby* 1 D. & E. 763; *Peacock v. Burt*, 13 L. J. 35; and see Sugd. 786, where the point is said to be clear.

(*m*) *Saunders v. Dehew*, 2 Vern. 271; *Allen v. Knight*, 5 Ha. 272, affirmed, 11 Jur. 527.

(*n*) *Belchier v. Renforth*, 5 Bro. P. C. 292; and see 11 Ves. 619: the general doctrine is disapproved of by the present Registration Commis-

(*l*) See 1 D. & E. 771; and *Ex*

Chap. XV.

Best right to call for legal estate, a protection in Equity.

Equity will not in general act against *bonâ fide* purchaser without notice.

And where a purchaser, not having got in an outstanding legal estate, has nevertheless the best right to call for it, he will in Equity be entitled to its protection (o).

And, as a general rule, a Court of Equity will not act adversely to a *bonâ fide* purchaser who has taken what purported to be a conveyance of the legal and equitable estates, or, perhaps, of such an equitable estate as apparently gave him an absolute and indefeasible right, (either immediately, or upon payment of a subsisting incumbrance,) to call for the legal estate, and has paid his purchase-money without notice of adverse claims (p): the rule, however, has been held to be different where the adverse claimant has a legal title (q); but this doctrine has been disapproved of, and is opposed to decisions by *Sugden*, C. (r). However, it seems probable, notwithstanding some old authorities to the contrary, that when a *bonâ fide* purchaser subsequently resorts to *fraud* in order to perfect his title, Equity will interfere for the purpose of depriving him of the advantage he has thus acquired (s).

(2.) *Purchaser with mere equitable title, is postponed to prior equitable claimants.*

As between mere equitable claimants, prior title prevails.

Where the purchaser has neither taken a conveyance of the legal estate, nor such a conveyance of the equitable estate as would seem to give him an absolute and inde-

sioners, and will probably eventually be destroyed by a General Registration Act.

(o) See *Wilker v. Bodington*, 2 Vern. 599; *Ex parte Knott*, 11 Ves. 618; *Bowen v. Evans*, 1 Jo. & L. 264.

(p) See and compare *Jerrard v. Saunders*, 2 Ves. J. 454; *Gail v. Osbatleston*, 1 Russ. 158; *Head v. Egerton*, 3 P. Wms. 281; *Att.-Gen. v. Backhouse*, 17 Ves. 290; *Jackson*

v. Rowe, 4 Russ. 514; and *V. C. K. B.'s judgment in Penny v. Watts*, 13 Jur. 459.

(q) See *Williams v. Lambe*, 3 Bro. C. C. 264; *Collins v. Archer*, 1 Russ. & M. 284.

(r) See *Payne v. Compton*, 2 Y. & C. 461; *Bowen v. Evans*, 1 J. & L. 178, 264; *Joyce v. De Moleyns*, 2 J. & L. 374; but see *Titley v. Davies*, 2 Y. & C. C. C. 399.

(s) *Sug.* 1020.

feasible right to call for the legal estate, the ordinary rule of equity, "*qui prior est tempore potior est jure*," will, it appears, be allowed to operate in favour of an adverse claimant: so that where a mortgagee lent money upon a conveyance of what he knew to be a mere equity of redemption, it was held by Lord *Thurlow*, that he must be postponed to mesne incumbrancers of whom he had no notice (*t*); and the decision has been several times recognised by Lord *Eldon* (*u*): so, also, where, in a recent case, bankers took an equitable mortgage by deposit of title deeds of an estate which was subject to a secret trust of which they had no notice, it was held, that such trust must prevail against their security (*w*): so, a purchaser of a legacy takes subject to the liability to refund for payment of debts (*x*).

Mortgagees by deposit, bound by secret trust.

And it has been decided in several cases (*y*), that, as respects equitable estates in land, the priority of a purchaser or incumbrancer is not affected by his giving or neglecting to give notice of his purchase or security, to the trustees, mortgagees, or other persons in whom the legal estate may happen to be vested; and that the ordinary rule, as to notice of assignments of choses in action, does not apply.

On purchase of equitable interest in land, no priority acquired by notice to owner of legal estate.

So, where the property is subject to a concealed incumbrance it seems that a purchaser of part, having merely the equitable estate, may throw the entire charge upon a subsequent innocent purchaser of the equitable estate in the residue (*z*).

Concealed incumbrance thrown wholly on puisne equitable purchaser.

(*t*) *Beckett v. Cordley*, 1 Bro. C. C. 353.

(*u*) See 1 Gi. & J. 243; 6 Ves. 192; 2 Russ. 214; and see *Jones v. Jones*, 8 Sim. 642, and see *Tourville v. Naish*, 3 P. Wms. 308.

(*w*) *Manningford v. Toleman*, 1 Coll. 670, and see *Att.-Gen. v. Flint*, 4 Ha. 156.

(*x*) *Jennings v. Bond*, 2 J. & L. 720.

(*y*) *Peacock v. Burt*, Coote on Mortgages, 569; *Jones v. Jones*, 8 Sim. 633; *Wiltshire v. Rabbits*, 14 Sim. 76; *Wilmot v. Pike*, 5 Ha. 14; *Bugden v. Bignold*, 2 Y. & C. C. 392.

(*z*) See *Hartly v. O'Flaherty*, Llo.

Chap. XV.

Rule as to
priority how
far appli-
cable as
against
charities.

Incumbrances in favour of a Charity seem to be subject to the same rules as those in favour of a private individual ; except that notice to the first purchaser is said to bind subsequent purchasers without notice (a).

(3.) *Purchaser, how far protected against defective execution of powers ;—against prior claimants who have encouraged him to purchase ;—and by Statute in various cases.*

Purchaser
how far
relieved
against de-
fective exe-
cution of
powers.

Equity will supply the defective execution of a power, if the defect consist merely in the non-observance of some required formality (b) ; but not if such formality be positively required by the legislature (c) : nor can it supply a defect which goes to the very nature of the power ; as where a power to appoint by will is attempted to be executed by deed (d) : and the Legislature has expressly excluded the interference of Equity, where a contract by a tenant-in-tail is not perfected in manner required by the 3 & 4 Will. IV. c. 74 (e).

Relieved
against in-
cumbran-
cers, &c.,
who en-
courage
purchase of,

The purchaser will also be protected in Equity against any person, (even an infant, or a married woman,) who, having a prior interest in the property, encourages, or permits him, to complete his purchase in ignorance of its existence (f) : and a party guilty of misrepresentation will

& G. tem. Pl. 208, 216, *Averall v.* 161.

Wade, Llo. & G. tem. Sug. 252.

(e) See sect. 47.

(a) *East Grimsted case*, Duke's Charitable Uses, 640 ; a mere length of possession was no protection in equity, before the late Statute of Limitations, to a purchaser who bought with notice of the charitable trust, *Att.-Gen. v. Christ's Hospital*, 3 Myl. & K. 344 ; as to the effect of the statute, *vide supra*, 190.

(b) See 2 Sug. Pow. 94, 6th ed.

(c) Sug. 1024.

(d) *Reid v. Shergold*, 10 Ves. 370 ; *Archibald v. Wright*, 9 Sim.

(f) See *Watts v. Cresswell*, 2 Eq. Ca. Abr. 515 ; *Savage v. Foster*, 9 Mod. 35 ; *Ibboltson v. Rhodes*, 2 Vern. 554 ; *Draper v. Borlace*, *ib.* 370 ; *Berrisford v. Milward*, 2 Atk. 49 ; *Govett v. Richmond*, 7 Sim. 1 ; *Clare v. Earl of Bedford*, 13 Vin. Abr. 536 ; *Boyd v. Belton*, 1 J. & L. 730 ; *Thompson v. Simpson*, 2 J. & J. 110 ; *Overton v. Banister*, 3 Hare, 503 ; *Nicholson v. Hooper*, 4 Myl. & Cr. 179 ; see further as to infants, *Stikeman v. Dawson*, 1 De G.

probably be bound by it, although he make it in ignorance or mistake, if he might have known the truth (*g*) : but a mortgagee, it appears, need not answer an inquiry as to the extent of his claims unless the intended purchaser be entitled and offer to redeem him (*h*) ; nor need he voluntarily communicate his claim to a person whom he knows to be about to purchase (*i*) ; unless he have reason to believe that a fraud is contemplated by the vendor (*k*).

The purchaser will also be protected in Equity against any person who, knowing his own title, encourages, or fraudulently permits the former, in ignorance of it, to lay out money in improving the property (*l*) ; but when a party has once given a distinct notice of his claim, and the purchaser subsequently lays out money, it lies on him to show that the other has abandoned, or given reason to believe, that he has abandoned, his claim (*m*) ; nor need the notice disclose the particulars of the claimant's title ; nor, if the claim exceed what he is entitled to, is the party in possession therefore justified in disregarding it (*n*).

And it appears that the mere fact of a purchaser or mortgagee allowing the vendor to retain the title deeds, will not, in the absence of other circumstances indicative of fraud, affect his title as against subsequent purchasers or incumbrancers (*o*) : even the fact of a mortgagee having returned the deeds to the mortgagor, will not, in itself,

or subsequent expenditure on, the property.

Mere omission to take deeds does not affect purchaser's title as against subsequent incumbrancers.

& S. 90 ; *Esrn v. Nicholas*, *ib.* 118, *supra* ; *Wright v. Snowe*, 2 De G. & S. 321.

(*g*) See *Pearson v. Morgan*, 2 Bro. C. C. 388 ; but see Sug. 1022, n.

(*h*) *Supra*, 228.

(*i*) *Osborn v. Lea*, 9 Mod. 97.

(*k*) *Vide supra*, p. 228.

(*l*) See *Kenney v. Browne*, 3 Ridg. P. C. 518 ; *East India Company v. Vincent*, 2 Atk. 83 ; and see *Williams v. Earl of Jersey*, Cr. & Ph.

91, and *Powell v. Thomas*, 6 Hare, 300.

(*m*) See *Clare Hall v. Harding*, 6 Hare, see 297.

(*n*) *S. C. ib.* 273.

(*o*) See *Evans v. Bicknell*, 6 Ves. 174 ; *Harper v. Faulder*, 4 Madd. 129 ; *Martinez v. Cooper*, 2 Russ. 198 ; *Stevens v. Stevens*, 2 Coll. 20 ; *Allen v. Knight*, 5 Ha. 272 ; affirmed 11 Jur. 527 ; *Farrow v. Rees*, 4 Beav. 21.

Chap. XV.

have this effect (*p*) : and the same would, it is conceived, hold good in the case of a purchaser, if a plausible reason were given for his assenting to, what would, *primâ facie*, be an unreasonable and suspicious request : in fact, mere indiscretion seems insufficient to postpone a purchaser ; there must, for that purpose, be an intent to facilitate a fraud, or a wilful indifference to a fraud which there was good reason to suspect was about to be committed.

Assignees of Insolvent, not asserting their rights for nineteen years, yet not postponed in Equity.

It has been even held, that the omission of the assignees of an insolvent for nineteen years to sell or take possession of his copyhold property, or of the copies of Court Roll, or to enter their title upon the Court Rolls, whereby the insolvent is enabled to retain the property as if owner, and mortgage it for value to a person without notice of the insolvency, is no sufficient ground for giving the mortgagee a charge in priority to the title of the assignees (*q*).

Purchaser how far protected against vendor's assignees in Bankruptcy and Insolvency,

By the 12 & 13 Vict. c. 106 (*r*), all payments really and *bonâ fide* made to or by a bankrupt, and conveyances executed by him before the date of the fiat, or the filing of a petition for adjudication, and all contracts, dealings, and transactions, by and with him really and *bonâ fide* made and entered into before the date of the fiat or the filing of such petition, are protected, if the other party has no notice of a prior act of bankruptcy (*s*) : the same act (*t*) also provides (*u*), that no person shall be liable to become bankrupt by reason of any act of bankruptcy committed more than twelve months before the issuing of the fiat, or filing of the petition for adjudication ; and also that no

(*p*) See *Martinez v. Cooper*, and *Stevens v. Stevens*, *ubi supra*.

(*q*) *Cole v. Coles*, 6 Ha. 517 ; affirmed on appeal, see p. 524.

(*r*) See sect. 133 ; and see 6 Geo. IV. c. 16, sect. 82.

(*s*) The validity of such payment, if made before the late Act came into operation, seems to depend upon the

provisions of the 6 Geo. IV. c. 16 ; see *Turquand v. Vanderplank*, 10 M. & W. 180, 194 ; Sug. 952.

(*t*) Which repeals the 2 & 3 Vict. c. 29, and so much of the 2 & 3 Vict. c. 11, as relates to Bankruptcy ; see Schedule A.

(*u*) Sects. 88 and 134.

purchase from any bankrupt, *bonâ fide*, and for valuable consideration, where the purchaser had notice of a prior act of bankruptcy, shall be impeached by reason thereof unless a fiat or petition for adjudication shall have been sued out or filed within twelve months after such act of bankruptcy : and the Gazette is made conclusive evidence of the bankruptcy, unless the bankrupt proceed to dispute the fiat or petition for adjudication within twenty-one days after the advertisement of the bankruptcy appears in the Gazette, (if he was within the United Kingdom at the date of the adjudication ;) or within three months, (if he was then in any other part of Europe ;) or within twelve months, (if he was then in any other part of the world) (*w*) : and no title to any real or personal property sold under any bankruptcy is to be impeached by the bankrupt, or any person claiming under him, in respect of any defect in the fiat or petition for adjudication, or in any of the proceedings under the same, unless the bankrupt shall, within the time allowed by the Act, have commenced proceedings to dispute, dismiss, or annul the fiat, petition, or adjudication, and duly prosecuted the same (*x*) : and the Act contains provisions, protecting, in the event of a fiat, petition, or adjudication, being superseded, annulled, or dismissed, any person who may *bonâ fide*, whether under compulsion or otherwise, and without notice of the institution of proceedings to dispute or annul such fiat, petition, or adjudication, have paid to the assignees any money due to the bankrupt's estate (*y*) : and if, before the time has elapsed within which the bankrupt may dispute the bankruptcy, his assignees commence any action or suit for any money due to his

(*w*) Sect. 233.

(*x*) Sect. 131. It was held in *Gould v. Shoyer*, 6 Bing. 738, that a similar provision in the 6 Geo. IV. c. 16 (see s. 87), did not protect a

purchaser, under a commission which is afterwards superseded, from the claim of the assignees under a subsequent commission.

(*y*) Sect. 155.

Chap. XV.

estate, the debtor is authorized to pay the money into Court, which payment is to be valid as against the bankrupt (*z*): and where a conveyance of the bankrupt's property would require to be registered, the certificate of appointment of assignees is to be registered: and if not so registered within, (as regards Great Britain and Ireland,) two months from the appointment, the same is not to affect the title of a purchaser for valuable consideration, without notice, claiming under a deed registered prior to the registration of such appointment (*a*): and other Acts (*b*) contain similar provisions for the registration of the certificates of appointment of assignees of insolvents.

A conveyance to a creditor, for a valuable consideration sufficiently strong in itself to influence the debtor to make it, is not "voluntary" within the meaning of the Insolvent Acts, although the consideration consists in part of a pre-existing debt (*c*).

or against
his judg-
ment cre-
ditors.

We have already taken a general view of the law relating to judgments, and have adverted to the 2 & 3 Vict. c. 11, which preserves to *bonâ fide* purchasers without notice (*d*), all those means of defence which were available before the passing of the 1 & 2 Vict. c. 110; and to the 3 & 4 Vict. c. 82, which, in effect, provides that notice (*d*) of an unregistered judgment shall not subject a purchaser to the extended remedies given to a creditor by the 1 & 2 Vict. c. 110. It may be further remarked, that an equitable incumbrancer or purchaser will, in Equity, be protected against a creditor under a subsequent judgment, although the latter may have acquired the legal seisin and

(*z*) Sect. 158; and see 5 & 6 Vict. c. 122, ss. 24 and 25.

(*a*) Sect. 143; see 1 & 2 Will. IV. c. 56, s. 27.

(*b*) 1 & 2 Vict. c. 110, s. 46; 5 & 6 Vict. c. 116, s. 8.

(*c*) *Margereson v. Saxton*, 1 Y. & C. Ex. 525; see *Stuckey v. Drewe*, 2 M. & K. 190.

(*d*) *Quære*, whether Palatinate judgments are within the Acts; *supra*, p. 240.

possession of the land under an *elegit* without notice of the mortgage or purchase (*e*) : but, as we have seen, the purchaser, after notice of the subsequent judgment, could not, without the consent of the creditor, safely pay to the vendor any part of the purchase-money which happened to remain unpaid.

Chap. XV.

The 14 Geo. II. c. 20, and the 3 & 4 Will. IV. c. 74 (*f*), contain provisions for giving, in certain specified cases, validity to defective Fines and Recoveries, either generally, or as in favour of purchasers ; and the 5 Vict. c. 32 (*g*), contains provisions for giving, in certain specified cases, validity to Fines and Recoveries levied and suffered in the now abolished Courts of Great Session in Wales ; and of Session in Cheshire : and the 11 & 12 Vict. c. 70, supplies the want of Proclamations, as respects Fines levied at Westminster (*h*). And the 54 Geo. III. c. 173 (*i*), and the 57 Geo. III. c. 100 (*k*), contain provisions for confirming, in certain specified cases, defective titles to land tax. And by the 2 Vict. c. 11, purchasers are protected against future obligations to the Crown, and against any *lis pendens*, unless the same respectively are registered as directed by the Act.

or against defects in Fines or Recoveries,

or in Sales of Land Tax,

or against *lis pendens*,

(4.) *As to priority under the Registration Acts.*

The existing registry acts purport to render any deed, affecting either the legal or equitable estate, void as against a purchaser or mortgagee claiming under an instrument of an earlier date of registration : at Law, notwithstanding notice, mere priority of registration absolutely determines the right to the property as between parties claiming under

or against unregistered deeds in Register Counties,

prior registration conclusive at Law but not in Equity.

(*e*) See *Whitworth v. Gaugain*, 1 Ph. 728, and cases there cited.

(*i*) See sect. 12.

(*f*) See sects. from 4 to 12.

(*k*) See sects. from 22 to 26 ;

(*g*) See sects. 2 and 3 ; *Doe v. Price*, 16 M. & W. 603.

Doe v. Phillips, 4 Per. & Dav. 562 ; and see as to sales by rector for redemption of land-tax, *Doe v. Woodward*, 1 Exch. R. 273.

(*h*) Sect. 1 ; see sect. 3.

Chap. XV.

adverse registered instruments purporting to pass the legal estate (*l*): but, in Equity, registration is no protection against an unregistered assurance of which the party claiming under the registered instrument had notice prior to the completion of his purchase or security (*m*): nor does registration of an equitable incumbrance prevent the person who then has, or subsequently acquires, the legal estate, from using it for the protection of any equitable interest which he may acquire in the property without notice of the registered incumbrance (*n*): and a purchaser advancing his money and taking a conveyance without notice of a prior deed which has been imperfectly registered, may, upon acquiring notice of it, register his own deed, and so gain priority (*o*).

Purchaser's
title how
impeachable
under Re-
gister Acts.

With the probable exception of a purchaser claiming under a devisee where the will has not been registered within the period prescribed by the Acts—in which case it seems doubtful whether a registered conveyance for value by the heir will not displace the registered title of the purchaser from the devisee (*p*); subject, of course, to the equitable doctrine of notice,—it may be laid down, as a general rule, that a purchaser can be evicted under the registration Acts, only by a person claiming under an instrument executed by the party under whom the two adverse titles are derived or parties taking under him by

(*l*) *Doe v. Allsop*, 5 B. & Al. 142.

(*m*) *Cheval v. Nichols*, Stra. 664; *Le Neve v. Le Neve*, 3 Atk. 646; see p. 651; *Tunstall v. Trappes*, *Gosling's case*, 3 Sim. 301; and see *Davis v. Earl of Strathmore*, 16 Ves.

419. The present Registration Commissioners recommend (see 1st Report) that priority of registration shall always give priority of title to a person claiming for valuable consideration under an assurance obtained without fraud; notwithstand-

ing he may have notice of the prior unregistered instrument: the great difficulty seems to be, to distinguish between actual notice and actual fraud.

(*n*) See *Morecock v. Dickens*, Amb. 678; *Bedford v. Bacchus*, *ib.* 680, cited; *Wrightson v. Hudson*, 2 Eq. Ca. Abr. 609.

(*o*) *Essex v. Baugh*, 1 Y. & C. C. C. 620.

(*p*) See an article, 14 Jur. pt. 2, p. 267.

act in Law, and registered prior to the registration of the document which forms the root of the purchaser's adverse title; for instance, if A. convey first to B. who does not register, and then to C. who does not register, and then C. convey to D. who registers, D. acquires no title against B. unless he can procure a conveyance from A. to C. to be duly registered (*g*); which would, it is conceived, be impracticable if A. and the witnesses attesting his execution of his original conveyance to C. were dead (*r*); so, where a lease is unregistered, no statutory title is acquired against the owner of the reversion by registering an assignment of the lease (*s*); but if A. (a woman), after conveying to B., marry, and her husband convey the estate which he takes *in jure mariti* to C. who registers before B.'s conveyance is registered, C. thereby acquires priority, (as intimated by the terms of the above proposition) (*t*): and the same rule would, it appears, prevail, if A., after conveying to B., were to die intestate, and her heir at law were to convey to C., who were to register before any registration by B. (*u*).

So, if A. convey to B., who does not register, and then B. convey to D., who registers merely his own conveyance, and then A. convey to C., who registers, D., it is conceived, has no title as against C. and parties claiming under him; for the registered conveyance to C. displaces B.'s title under his unregistered conveyance; and this being gone the conveyance to D. goes with it: and in such a case a person searching the register would have no reason to suppose that the property conveyed by B. to D.

(*g*) *Jack v. Armstrong*, 1 Hud. & Bro. 727.

(*r*) *S. C.*, and *Essex v. Baugh*, 1 Y. & C. C. C. 620; *vide supra*, 319, 320, as to the necessity for the memorial being attested by a witness to the execution of the deed by the

grantor.

(*s*) *Honeycomb v. Waldron*, 2 Stra. 1064; and see *Battersby v. Rochfort*, 2 J. & L. 431.

(*t*) See *Warburton v. Loveland*, 2 Dow. & C. 480.

(*u*) See *S. C.*

Chap. XV. had ever been held by A.; nor, as respects parties claiming under C., would it make any difference that the assurances by C. were unregistered (*w*).

Priorities under Fines and Recoveries Abolition Act.

We have already referred to the provisions in the 3 & 4 Will. IV. c. 74 as to the priorities of parties claiming under disentailing assurances, both of freeholds and copyholds (*x*).

(5.) *As to notice—what it is—how it may be proved—and its effect—of void or voidable estates and voluntary or fraudulent conveyances—equitable relief against purchaser with notice.*

Purchaser only affected by actual notice of unregistered assurance or judgment.

Notice of an unregistered security must, in order to affect a purchaser claiming under a registered instrument, be actual notice affecting him with fraud (*y*): so, also, notice of an unregistered judgment must, it would seem, be actual in order to affect a purchaser (*z*): and actual notice to the solicitor or agent in the transaction is actual notice to the client or principal (*a*): and where the principal is affected with personal knowledge, it is, of course, immaterial whether he acquired it in one or another character (*b*).

Notice to solicitor is notice to client.

Actual notice, when, by whom, and how to be given.

Actual notice, according to Sir *E. Sugden* (*c*), “must be given by a party interested in the property (*d*), and in the course of the treaty for the purchase:” and he also cites a remark made by the Master of the Rolls, in *Jolland v. Stainbridge* (*e*), intimating a doubt whether a general

(*w*) See *S. C.*

(*x*) *Vide supra*, p. 321, *et seq.*

(*y*) See *Jolland v. Stainbridge*, 3 Ves. 478; *Wyatt v. Barwell*, 19 Ves. 435; *Buckley v. Lananze*, Ll. & G. Rep. t. Pl. 327, 341.

(*z*) See *Tunstall v. Troppe*, *Gosling's case*, 3 Sim. 301.

(*a*) *S. C.*, and *Le Neve v. Le Neve*,

3 Atk. 646; and see *Davis v. Earl of Strathmore*, 16 Ves. 419; *Sheldon v. Cox*, 2 Eden, 224.

(*b*) See *Meux v. Bell*, 1 Ha. 88.

(*c*) Sug. 1040; and see 1 J. & L. 442.

(*d*) See *Wildgoose v. Wayland*, Goulds. 147.

(*e*) 3 Ves.; see p. 486.

notice of title is sufficient, and whether it is not necessary to specify the instrument under which the claimant is entitled.

Perhaps all these points should be cautiously acted on in practice (*f*); it is one thing to say that mere "flying reports" (*g*) are not notice, and another to affirm that a purchaser could not be affected by a deliberate and particular statement of an adverse claim unless made either by or on behalf of the claimant; nor does there seem to be any reason why, where notice has been given to the purchaser prior to the commencement of the treaty, the Court should not consider whether, (as in the case of an agent or solicitor,) such notice must not have been present to his mind during the treaty; of the case cited by Sir *E. Sugden* in support of the unqualified proposition (*h*) it may be remarked, that considering its date (*i*), and the cautious character of the Judge, (Lord Keeper *Coventry*,) an unwillingness to do anything which might be construed into a breach of parliamentary privilege may have influenced the decision; which was, that a Member of the House of Commons was not to be considered as affected with notice of what came to his knowledge as Parliamentary business within the walls of the House.

So, the doctrine hinted at in *Jolland v. Stainbridge* seems to be at variance with a later case where it was held that a purchaser, having notice that A. had a judgment or warrant of attorney affecting the estate, was bound in Equity, although the incumbrance was in fact a mortgage (*k*); so, a general recital in a deed that there were mortgages on the estate, has been held, by Lord *Langdale*,

(*f*) See, as to the first and third, *Charitable Uses*, 640.

Butcher v. Stapely, 1 Vern. 363; (*i*) A. D. 1633.

and *Fry v. Porter*, 1 Mod. 311.

(*k*) *Taylor v. Baker*, 5 Pri. 306;

(*g*) *Goulds*. 147.

and see 1 Ha. 58.

(*h*) *East Grimsted case*, Duke's

Chap. XV.

to amount to notice of a mortgage not specified in such deed (*l*).

Purchaser, whether affected by notice of construction of doubtful instrument.

It seems probable that a purchaser, having notice of an executory instrument,—(*e.g.*, marriage articles,)—of doubtful meaning, would, as a general rule, be bound to take notice of the construction which would be put upon it by a Court of Equity; and must, therefore, see, that any instrument which may have been executed in pursuance thereof, and which is material to the title, has been framed in accordance with such construction (*m*): but, where a long period has elapsed since the sale, the Court may decline to fix upon a purchaser a difficult construction of a doubtful instrument, although it might have granted relief as between the parties thereto if there had been no sale (*n*).

Constructive notice—nature of.

Constructive notice, (which, in its general effects, is similar to actual notice (*o*),) has been defined to be, “evidence of notice, the presumptions of which are so violent that the Court will not allow even of its being controverted” (*p*): this, perhaps, scarcely conveys a satisfactory notion of the nature of the doctrine; the reported decisions upon which, it is submitted, clearly show, that constructive notice is often held to exist in the absence of any idea by the Court of the existence of actual personal knowledge; if, for instance, a purchaser, having notice of a deed as being one which affects the property, is induced to rely upon the vendor’s representation as to its contents, the Court will hold him bound by those contents, even although it were satisfactorily shown from the nature of the transaction that he placed implicit and *bond fide* confidence

(*l*) *Farrow v. Rees*, 4 Beav. 18; (*n*) *Thompson v. Simpson*, 1 Dru. and see *Lacey v. Ingle*, 2 Ph. 413; & War. 459.
Gibson v. Ingo, 6 Ha. 124. (*o*) *Sheldon v. Cox*, Amb. 626.
(*m*) See Sug. 1060; *Davies v.* (*p*) 2 Anstr. 438; and see Sug.
Davies, 4 Beav. 54. 1041.

in the good faith of the vendor (*q*); so, in *Jackson v. Rowe* (*r*), Sir *John Leach* says, "although he, (the purchaser), may, in fact, have been ignorant of the settlement, yet, in Equity, he must be fixed with all the knowledge which it was reasonable he should acquire": constructive notice may, perhaps, be rather considered to consist in those circumstances under which the Court concludes, either that the party, (personally or through his agent,) has fraudulently abstained from acquiring actual notice, or has been guilty of such negligence in not availing himself of the means of acquiring it, as, if permitted, might be a cloak to fraud, and which, therefore, the common interests of society require should, in its consequences, be treated as equivalent to actual notice: what degree of negligence is sufficient for this purpose remains to be considered.

In a recent case, before V. C. *Wigram*, it was asserted by the Court, that the cases in which constructive notice has been established resolve themselves into two classes; first, cases in which the party charged has had actual notice that the property in dispute was, in fact, charged, incumbered, or in some way affected; and the Court has, thereupon, bound him with constructive notice of facts and instruments to a knowledge of which he would have been led by an inquiry after the charge, incumbrance, or other circumstance affecting the property, of which he had actual notice; and, secondly, cases in which the Court has been satisfied, from the evidence before it, that the party charged had designedly abstained from inquiry, for the very purpose of avoiding notice (*s*): and, in a later case, the V. C., with reference to his previous judgment, repudiates the notion, (which had been attributed to him,) "that there may not be a degree of negligence so gross that a Court of Equity may treat it as evidence of fraud—

Propositions
of *Wigram*,
V. C. as to
constructive
notice.

(*q*) See 1 Phill. 253.

(*r*) 2 Sim. & St. 475.

(*s*) *Jones v. Smith*, 1 Ha.; see
p. 55.

Chap. XV.

impute a fraudulent motive to it—and visit it with the consequences of fraud, although (morally speaking) the party charged may be perfectly innocent”; and further remarks, “Negligence, as I understand the term, supposes a disregard of some fact known to the purchaser, which at least indicated the existence of that fact, notice of which the Court imputes to the purchaser” (*t*).

are capable
of extension
—*semble*.

Mere neg-
ligence may
have the
effect of
notice.

The propositions of the V. C. seem, however, scarcely to provide for those cases in which a purchaser is affected with constructive notice, not through his personal knowledge of any fact leading him to actual notice, but by his neglect of the usual and recognised means for acquiring such knowledge or notice; for instance, a public Act of Parliament is notice to all the world (*u*); so is a *lis pendens* (*w*), if registered under the Act of 2 Vict. c. 11 (*x*), or a deed or will registered in a register county or entered on Court Rolls (if the purchaser search over the period within which the instrument is registered (*y*) or the entry is made); or a judgment entered at the Common Pleas, if the purchaser search the register; so, if a purchaser, without any fraudulent intention, (the absence of which might be evidenced by his payment of a full price for the property), were to accept a conveyance without any previous investigation of title, relying on the mere assurance of the vendor that he was absolute owner, he would, nevertheless, be held to have constructive notice of any

(*t*) *West v. Reid*, 2 Hare, 257, 259.

(*u*) Sug. 1044; although it be a local Act, *Barraud v. Archer*, 2 Sim. 433; *S. C.*, 2 Russ. & Myl. 751. *Quære*, as to a private Act made public; Sug. *ubi supra*.

(*w*) *Ibid*.

(*x*) See sect. 7. But it is said to be only notice of what is charged on the bill, and not of equities which may possibly arise out of the matters in question in the suit; see *Shalcross v.*

Dixon, 5 Jarm. Conv. by S. 493; but see *Jennings v. Bond*, 2 J. & L. 720, *et quære*. An administration suit is a *lis pendens* as respects estates sold under the decree; *Drew v. Earl of Northbury*, 3 J. & L. 267; filing of the bill, and not service of the subpoena, is the commencement of a *lis pendens*, *S. C.*

(*y*) *Hodgson v. Dean*, 2 Sim. & St. 221; see, as to the extent to which a memorial is notice, *Rochard v. Fulton*, 1 J. & L. 413.

defect appearing on the title (*z*); although he could be scarcely said to have actual notice of any fact indicating the existence of such defect.

To consider, however, the cases falling within the rules laid down by V. C. *Wigram*, and which, with the above exceptions, seem to comprise the authorities on the subject: it has been held, that notice of a postnuptial and apparently voluntary settlement is constructive notice of the antenuptial agreement on which it is founded (*a*); that actual notice to a purchaser, of an instrument as one affecting the estate, is constructive notice of all instruments to which an examination of the first would have led him (*b*); even although such prior instruments are not actually recited, but there is only a recital that the property is subject to limitations which in fact correspond with the limitations thereby created (*c*); so, a recital that the property was held upon such trusts for the use of A., B. and C. (parties to the conveyance) "for such estates in possession, reversion, or remainder as they became entitled to after the death of D." was held to be notice of *prior* trusts in favour of other parties which would have been discovered by an examination of the instrument creating the trusts which were referred to in the recital (*d*); so, notice of an equitable claim, as affecting an unspecified portion of the pro-

Purchaser having notice of a particular fact or instrument held to have notice of connected facts and instruments.

(*z*) See Lord Lyndhurst's remarks on *Jackson v. Rowe*, in 1 Phil. 255; and see to the same effect Sir J. Wigram's remarks in *Neesom v. Clarkson*, 2 Ha. 173, and *West v. Reid*, 2 Ha. 260.

(*a*) *Ferrars v. Cherry*, 2 Vern. 384; as to the authority of the case, which has been questioned, see Mr. Raithby's note, 3rd ed.

(*b*) *Coppin v. Fernyhough*, 2 Bro. C. C. 291; *Bisco v. Earl of Banbury*, 1 Ca. in Chan. 287, 291; *Tanner v. Florence*, *ib.* 259, 260; *Davies v. Tho-*

mas, 2 Y. & C. 234; (where however it was also held that notice of a prior conveyance and of the then vendor's title was notice of his lien for unpaid purchase-money, on which point the decision cannot it would seem be supported; see Sug. 879); and *Butler v. Lord Portarlington*, 1 Dru. & War. 20; and see cases cited, *supra*, n. (*z*).

(*c*) *Neesom v. Clarkson*, 2 Hare, 163; see p. 165.

(*d*) *Malpas v. Ackland*, 3 Russ. 273.

Chap. XV. perty, is notice of the claim as in fact affecting the entirety (e).

So, notice of the land being in the occupation of a person other than the vendor, has been held to be notice of the occupier's equities (f); even of an agreement for the sale to him of the fee simple (g); but this has always been considered an extreme case (h) and the doctrine of it has not been extended.

So, notice of the legal estate being outstanding, is notice of the trusts on which it is held (i); and notice that the title deeds are in the possession of a third party, is notice of any charge he has upon the property (k); so, notice that the title is a mortgage title, seems to be notice of any dealings by the mortgagee with the mortgagor which may have kept alive the equity of redemption (l).

Purchaser held to have notice of facts which he ought to have known.

So, where a person, entitled only for life, represented that she was seised in fee, and conveyed as if so seised, a person claiming under her for valuable consideration was held to be affected with notice, the settlement being the only document under which she could claim the estate (m); and, as observed by Lord *Lyndhurst* (n), no one could find fault with that decision; for either the party did or he did not investigate the title; if he did not, he was guilty of great negligence; if he did, he must have seen that the party conveying to him had only a life estate: so a les-

(e) *Att.-Gen. v. Flint*, 4 Ha. 147.

(f) *Allen v. Anthony*, 1 Mer. 282; *Taylor v. Stibbert*, 2 Ves. jun. 437, 440; *Hiern v. Mill*, 13 Ves. 120; *Meux v. Maltby*, 2 Sw. 281.

(g) *Daniels v. Davison*, 16 Ves. 249; 17 Ves. 433, and *Douglas v. Whitterwronge*, 16 Ves. 254, cited.

(h) *Per V. C. Wigram*, 1 Ha. 62; and see 2 Russ. & M. 629, and Sug. 1053; but see also *Penny v. Watts*, 1 Mac. & G. 150.

(i) *Anon. Freem. Ch. Rep.* 137.

(k) *Hiern v. Mill*, 13 Ves.; see p. 122; *Dryden v. Frost*, 3 Myl. & Cr. 670; and see 1 Ha. 61; *Worthington v. Morgan*, 16 Sim. 547; see Sug. 1055.

(l) See *Hansard v. Hardy*, 18 Ves.; see p. 462.

(m) *Jackson v. Rowe*, 2 Sim. & St. 472 and 475; and see *Roddy v. Williams*, 3 J. & L. 1.

(n) 1 Phil. 255; and see V. C. Wigram's remarks in *Neeson v. Clarkson*, 2 Ha. 173.

see (*o*), or a sub-lessee (*p*), has notice of the title of the immediate, and, (in the case of a sub-lessee), original lessor; so, a person has been held to be affected with notice of a fraud affecting a deed, and which the unusual manner in which it was executed ought to have suggested to his solicitor (*q*); so, where a purchaser had notice of another person having a judgment or warrant of attorney affecting the estate, and refrained from making any inquiry, he was held bound, although the incumbrance was in fact a mortgage (*r*); and, as a general rule, if a person knows that another has or claims an interest in the property for which he is dealing, he is bound to inquire what that interest is, and if he omit to do so, he will be bound, although the notice was inaccurate as to the particulars or extent of such interest (*s*): so, a purchaser, having notice that a legatee had released the executrix from a legacy, and that, *in lieu thereof*, the latter had by will devised a freehold estate to such legatee, was held to have notice of such devise being pursuant to a written agreement between the parties (*t*): so (*u*), a mortgagee not inquiring for the deeds was postponed to a prior equitable incumbrancer, upon the ground (*w*) of his having purposely abstained from making inquiry, the mortgage being for securing a pre-existing debt; that, in short, there was wilful blindness: and it has been held, in a late case, that the mere omission to ask for the deeds is sufficient to postpone a mortgagee, to the equitable lien of the actual holder (*x*).

But, on the other hand, a private Act of Parliament, or

Cases in which a

(*o*) *Att.-Gen v. Backhouse*, 17 Ves. 293; *Butler v. Lord Portarlington*, 1 Dru. & W. 20.

(*p*) *Steedman v. Poole*, 6 Ha. 193; and see *Cosser v. Collinge*, 3 Myl. & K. 283.

(*q*) *Kennedy v. Green*, 3 Myl. & K. 699.

(*r*) *Taylor v. Baker*, 5 Pri. 306.

(*s*) See *Gibson v. Ingo*, 6 Ha. 124.

(*t*) *Penny v. Watts*, 1 Mac. & G. 150, 158.

(*u*) *Whitbread v. Jordan*, 1 Y. & C. 303.

(*w*) 1 Phil. 255.

(*x*) *Worthington v. Morgan*, 16 Sim. 517.

Chap. XV.
purchaser is
not affected
with notice.

a private Act made public (*y*), is not, in itself, notice to a purchaser; nor is registration of a deed, &c. in a County Register (*z*), nor registration of a judgment at the Common Pleas (*a*), nor the entry of a document on the Court Rolls of a Manor (*b*), notice, unless he make a search extending over a period comprising the entry in the Register or Court Rolls, (as the case may be): nor is a Commission of Bankruptcy in itself notice (*c*), nor a Decree in a Court of Equity (*d*), nor a *lis pendens*, unless registered at the Common Pleas (*e*): although in all these cases the purchaser has the means of acquiring notice.

So, notice of a past tenancy is no notice of the tenant's equitable interests (*f*); nor is a purchaser from a derivative lessee affected with constructive notice of the contents of the original lease (*g*); nor, although a purchaser of a lease is bound to know from whom the lessor derived his title, is he affected with notice of all the circumstances under which he so derived it (*h*): nor, where a sale by fiduciary vendors is apparently regular, need a purchaser inquire into collateral questions—such as the mode in which the sale has been conducted (*i*),—although he will be affected with notice of a breach of trust clearly deducible from facts appearing on the face of the assurance (*k*); nor is notice of a tenancy constructive notice of the lessor's title (*l*); nor, where the vendor is himself the tenant, and has acknowledged payment of the purchase-money both in

(*y*) 3 Bos. & P. 578; Sug. 1044.

(*z*) *Hodgson v. Dean*, 2 Sim. & St. 221; affirmed, see Sug. 1048.

(*a*) See and consider 2 & 3 Vict. c. 11, s. 5.

(*b*) *Bugden v. Bignold*, 2 Y. & C. C. C. 377.

(*c*) See *Hitchcox v. Sedgwick*, on appeal, Sug. 1051.

(*d*) Sug. 1047.

(*e*) 2 & 3 Vict. c. 11, s. 7.

(*f*) *Miles v. Langley*, 1 Russ. & M. 39.

(*g*) See *Hanbury v. Litchfield*, 2 Myl. & K. 633, and 1 Ha. 62.

(*h*) *Att.-Gen. v. Backhouse*, 17 Ves. 293.

(*i*) See *Borell v. Dann*, 2 Ha. 440. 450.

(*k*) See *Att.-Gen. v. Pargeter*, 6 Beav. 150.

(*l*) Sug. 1056.

the body of the conveyance and by the usual indorsed receipt, is the tenancy notice of his lien for any part thereof which may in fact remain unpaid (*m*) ; nor will a *bonâ fide* purchaser, otherwise without notice, be affected by the mere circumstance of the vendor having been out of possession for many years (*n*) : nor does the mere absence of the title deeds seem in itself to be notice of the interest of the person holding them (*o*) : although it may be otherwise if their absence is not explained or accounted for (*p*) : nor does notice of the preparation of a draft seem in itself to be notice of the executed deed (*q*).

So, probably, the mere fact of attesting the execution of a deed will not fix the witness with notice of its contents (*r*) ; nor, where a purchaser is informed of the existence of an instrument which may, but does not necessarily, affect the property, and he is assured that the instrument does not affect that property, but relates to other property, and he, acting fairly and honestly, believes such statement, and it turns out that he is misled, and that the instrument does relate to the property, will he be fixed with a notice of its contents (*s*) : nor will a purchaser be affected by an ambiguous recital (*t*) ; or by circumstances inducing merely a suspicion of fraud (*u*) ; or by the usual trusts of a term assigned to attend the inheritance (*w*), where no reference is made to any particular instrument or course of limitations : so, notice of there

(*m*) See *White v. Wakefield*, 7 Sim. 401.

(*n*) See *Orwick v. Plumer*, Bac. Abr. Mortgage, E, s. 3 ; and see 1 Ha. 63.

(*o*) *Plumb v. Flutt*, 2 Austr. 432 ; *Evans v. Bicknell*, 6 Ves. 174 ; and see 1 Ha. 63, and 5 Ha. 279.

(*p*) *Worthington v. Morgan*, 16 Sim. 547 ; see *Dryden v. Frost*, 3 Myl. & Cr. 670.

(*q*) See *Cothay v. Sydenham*, 2 Bro. C. C. 391.

(*r*) See Sug. 1060, and *cased cited*.

(*s*) See *Jones v. Smith*, 1 Phil. 244, 253 ; and see *West v. Reid*, 2 Ha. 260.

(*t*) *Kenney v. Browne*, 3 Ridg. P. C. 512 ; and see 2 Ha. 175.

(*u*) Sug. 1058 ; *M^cQueen v. Fairquhar*, 11 Ves. 467.

(*w*) Sug. 1058.

Chap. XV.

being a change in the solicitors who are professionally to represent a particular interest, is not, in itself, notice of a change in the ownership of such interest (*x*).

In a modern case, where the legatee of a legacy charged on land, assigned it for value, and then, without the concurrence of the assignee, joined in mortgaging the estates first to A. and then to B., the latter mortgage being expressed to be, "subject to prior incumbrances," but B. had no notice of the assignment of the legacy, and the mortgagors did not appear to have intended to include it among "prior incumbrances," B. was held to have priority of the assignee (*y*).

Purchaser
not bound
to use ex-
cessive
caution.

And it appears that, as a general rule, the mere omission to make those inquiries which a prudent, cautious, and wary person would ordinarily make, is not, in itself, sufficient to fix a *bonâ fide* purchaser with notice of what he might have ascertained by making such inquiry (*z*): the fact of the conveyance being in consideration of a pre-existing debt, would, of course, induce a doubt whether the purchaser were acting *bonâ fide*; but the Courts seem generally disinclined to extend the doctrine of constructive notice (*a*).

Notice to
counsel,
solicitor or
agent is
notice to
purchaser.

The purchaser, (although an infant purchasing under the sanction of a Court of Equity (*b*),) is bound by notice to his counsel (*c*), solicitor, or agent (*d*), or, perhaps, trustee (*e*), if acquired either in the same transaction, or in a prior transaction but under circumstances which satisfy the Court that the notice must have been recollected (*f*):

(*x*) *West v. Reid*, 2 Ha. 249.

(*y*) *Greenwood v. Churchill*, 6 Beav. 314.

(*z*) See 1 Phil. 257.

(*a*) See 1 Phil. 254; 1 J. & L. 441; Sug. 1054; but see *Worthington v. Morgan*, 16 Sim. 547, and *Penny v. Watts*, 1 Mac. & G. 150.

(*b*) *Toulmin v. Steere*, 3 Mer. 210.

(*c*) *Sheldon v. Cox*, Amb. 624.

(*d*) *Toulmin v. Steere*, *ubi supra*.

(*e*) *Wise v. Wise*, 2 J. & L. 403.

(*f*) *Hargreaves v. Rothwell*, 1 Keen, 154; *Brothers v. Bence*, Fitz. 118; *Perkins v. Bradley*, 1 Ha. 219 (in which two cases the solicitor was

the presumption against such recollection would, no doubt, be stronger in the case of counsel than of a solicitor (*g*); and, even as respects a solicitor, there seems to be a difficulty in holding that a purchaser, employing one who has not acted for the vendor, can be affected by notice acquired by him previous to retainer (*h*).

And, as a general rule, the purchaser is equally affected with notice although the solicitor, &c., be also employed by the vendor (*i*), or be himself the vendor (*k*); it was decided by Lord *Brougham*, in opposition to the opinion of Sir *J. Leach*, that a client is not to be affected with notice of a prior *fraud* committed by his solicitor, which the latter would, of course, conceal (*l*); this decision may, perhaps, be thought to be inconsistent with others, in which it has been held, that a mortgagee, employing the mortgagor as his counsel or solicitor, is affected with notice of a prior, and, *as against the client-mortgagee*,—which is sufficient to bring the case within Lord *Brougham's* reasoning,—*fraudulent* incumbrance created by such mortgagor (*m*): notice to a town or country agent would, in general, be notice to the principal solicitor (*n*); but, probably, the mere fact of the purchaser's solicitor allowing, (from motives of private friendship,) the vendor's solicitor to transact, for his own benefit, the principal part of the business which is usually done by the former, would not be sufficient to constitute an agency (*o*).

Although solicitor, &c. is employed by both parties, or is himself the vendor.

his own client in the later transaction); *Fuller v. Bennett*, 2 Ha. 394; and see *Tylee v. Webb*, 6 Beav. 552.

(*g*) See 5 Jarm. Conv. by S. 490.

(*h*) See *Fuller v. Bennett*, 2 Ha. 394, 404, and Lord Cottenham's remark as to Mr. Wightwick's evidence in *Wilde v. Gibson*, 1 H. L. C. 624.

(*i*) *Le Neve v. Le Neve*, 3 Atk.; see p. 648; *Dryden v. Frost*, 3 M. & C. 670.

(*k*) See *Sheldon v. Cox*, Amb. 624; *Dryden v. Frost*, *ubi supra*.

(*l*) *Kennedy v. Green*, 3 Myl. & K. 699.

(*m*) *Sheldon v. Cox*, Amb. 624; *Marjoribanks v. Hovenden*, 6 Ir. Eq. Rep. 238; but see *Kendall v. Hulls*, 11 Jur. 864.

(*n*) See and consider *Norris v. Le Neve*, 3 Atk. 37; Sug. 1041.

(*o*) See *Kendall v. Hulls*, 11 Jur. 864.

Chap. XV.

Professional confidential communications, notice not to be proved by.

For the purpose of fixing a purchaser with notice, the evidence of his counsel, solicitor (*p*), or (probably) certificated conveyancer (*q*), respecting confidential (*r*) professional communications, is inadmissible; and the rule includes the clerk of the professional adviser (*s*), and the agent employed by the solicitor (*t*); but not (it would appear) an unprofessional agent employed by the purchaser himself (*u*), unless he be used merely as the medium of communication with the professional adviser (*w*): and the privilege extends to communications made by an unprofessional agent to the professional adviser (*x*); but the rule does not include a solicitor whom the purchaser consults, not professionally, but as a friend, agent, or steward (*y*); nor a person whom he consults as, and supposing him to be, a solicitor, but who is not so in fact (*z*); nor, where the same solicitor is employed by both parties, does it extend to communications which the purchaser makes to him as solicitor for the vendor (*a*); nor to communications made to the solicitor from collateral quarters (*b*); but it extends to all communications which take place between the purchaser and his solicitor (as such) with reference to the purchase (*c*), and to documents

(*p*) See *Parkhurst v. Lowten*, 2 Sw. 194.

(*q*) See *Cromack v. Heathcote*, 2 Bro. & Bing. 4; *Gresley on Ev.* 380, 2nd ed.

(*r*) *Walsh v. Trevanion*, 15 Sim. 577.

(*s*) *Taylor v. Forster*, 2 C. & P. 195.

(*t*) *Steele v. Stewart*, 1 Ph. 471.

(*u*) *Kerr v. Gillespie*, 7 Beav. 572; and see 1 Ph. 693.

(*w*) *Reid v. Langlois*, 1 Mac. & G. 627.

(*x*) *Carpmael v. Powis*, 1 Ph. 687.

(*y*) See *Wilson v. Rastall*, 4 Durn. & E. 753, 759; *Greenlaw v. King*, 1

Beav. 137; and see *Blenkinsopp v. Blenkinsopp*, 10 Beav. 277; reversed on further evidence, 2 Phil. 607.

(*z*) *Fountain v. Young*, 6 Esp. 113.

(*a*) See *Perry v. Smith*, 9 M. & W. 681.

(*b*) *Sawyer v. Birchmore*, 3 Myl. & K. 572. A map of the estate which the owner leaves with his solicitor for the purpose of effecting a sale is not privileged; *Doe d. Marriott v. Lord Hertford*, 13 Jur. 632.

(*c*) See *Carpmael v. Powis*, 1 Ph. 692; *Herring v. Cloberry*, 1 Ph. 91; *Jones v. Pugh*, 1 Ph. 96; as to forms of the demurrer, see *Walsh v. Trevanion*, 15 Sim. 577.

belonging to the purchaser which he leaves with his solicitor (*d*) ; nor does the privilege cease by reason of the professional adviser acquiring a personal interest in the property to the title of which the confidential communication related (*e*).

And it appears that even the purchaser himself will not, if a suit be instituted against him, be bound to produce letters written, or cases stated for the opinion of counsel, either by himself or his solicitor, with a view either to that suit or even to a suit with third parties, if respecting the same matter and involving the same question to which such letters and cases relate ; nor, *à fortiori*, the opinions obtained on such letters and cases (*f*) ; and, according to recent decisions, the same privilege seems to exist in favour of cases laid before counsel with reference to a known defect in title, although not with any view to threatened litigation (*g*) : but, of course, an opinion which in effect was taken for the joint benefit of the party seeking and the party refusing production is not protected (*h*).

Nor will purchaser be obliged to produce cases, opinions, &c.

As to the effect of notice when established ;—It may be laid down, as a general rule, that a purchaser with notice, is, in Equity, “ bound to the same extent, and in the same manner as the person was of whom he purchased (*i*) :” for

Effect of notice.

(*d*) Sug. 1062 ; but where land was recovered in ejectment, the solicitor of the defendant was held bound in equity to state to whom he had on behalf of his client delivered the title deeds ; *Banner v. Jackson*, 1 De G. & S. 472.

(*e*) *Chant v. Brown*, 7 Ha. 79.

(*f*) *Holmes v. Baddeley*, 1 Ph. 476 ; and see earlier cases there cited.

(*g*) See *Pearse v. Pearse*, 1 De G. & S. 12 ; *Herring v. Cloberry*, 1 Ph. 91 ; *Holmes v. Baddeley*, *ib.* 476 ; *Lord Walsingham v. Goodricke*, 3

Ha. 122 ; *Reece v. Trye*, 9 Beav. 316 ; *Penruddock v. Hammond*, 11 Beav. 59, 61 ; but see *Beadon v. King*, 13 Jur. 550, V. C. E. ; as to cases of fraud, see *Follett v. Jefferies*, 13 Jur. 465 ; on appeal, 972 ; *Reynell v. Sprye*, 11 Beav. 618 ; the mere connection of the documents with the Acts impeached by the bill is no ground for their production, *S. C.* on appeal.

(*h*) *Reynell v. Sprye*, 10 Beav. 51.

(*i*) Sug. 1031 ; *Taylor v. Stibbert*, 2 Ves. jun. 439.

Chap. XV. instance, he will be bound by a trust, or incumbrance, or by any agreement respecting the estate of which he has notice and which would have bound the estate in the hands of the vendor (*k*).

Notice of void or voidable estates, agreements, &c., how far binding.

The consideration of how far the purchaser is bound by notice of an executory or executed agreement, which is, either wholly or in part, void or voidable, gives rise to questions of greater difficulty.

Purchaser from tenant for life and remainderman held bound to give effect to agreement by the former for grant of unauthorised lease: *sed qu.*

Where A., seised in fee, in consideration of his son's marriage settled the estate on himself for life, with remainder to his son for life, with the usual limitations in strict settlement on his son's issue, with remainder to himself (A.) in fee: and with power for A. to lease, and with his son to sell the estate; and A. agreed to grant a lease exceeding the power; and then A. and the son, sold the estate, the purchaser, who had notice of the agreement, was compelled to perform it at the suit of the intended lessee (*l*); Lord *Roslyn* thought that A.'s agreement bound the estate except as against the son and other remaindermen claiming under the settlement, and that the sale took the estate out of the settlement and left it indefeasibly impressed with the agreement (*m*). Lord *Redesdale* has expressed an opinion that the purchaser, except to the extent of A.'s life estate and remainder in fee, ought not to have been bound (*n*): Sir *E. Sugden* seems to consider (*o*) that the decision can be supported on the ground that the purchaser was bound to indemnify the vendor against his liability to damages under the contract, and refers to a case (*p*) where a copyholder having granted a lease renewable with the Lord's licence,

(*k*) See *Dowell v. Dew*, 1 Y. & C. C. 345.

(*l*) *Taylor v. Stibbert*, 2 Ves. jun. 437.

(*m*) See p. 442.

(*n*) See 2 Scho. & Lef. 599, and *Harrison v. Duignan*, 2 Dru. & War.

304.

(*o*) Sug. 1033.

(*p*) *Lufkin v. Nunn*, 11 Ves. 170.

and the Lord having, in the name of a trustee, purchased the copyhold interest with notice of the lease, and having refused to renew, a bill was filed by the lessee for specific performance, and Lord *Eldon* directed a case to be submitted to the Common Pleas as to whether damages could be recovered by the lessee upon the lessor's covenants, and upon receiving an opinion in the negative dismissed the bill; this, however, can scarcely be considered a decision: and it may be doubted whether the vendor's right to an indemnity (supposing it to exist) can give to the lessee a better hold *upon the estate* than he originally possessed.

And it has been held that a purchaser who buys expressly subject to a partial interest which has no existence (*q*) or is voidable (*r*), cannot dispute the right of the party in whose favour the reservation is made; and it has even been held in Ireland (*s*) that where an estate is sold subject to void or voidable leases the vendor may set them aside for his own benefit, upon securing to the purchaser the payment of the rents and performance of the covenants; but the point is treated as doubtful by Sir *E. Sugden* (*t*); although, he judicially admits that "if a man buys an estate subject to an incumbrance, and it turns out that it is not a valid incumbrance, yet he may so buy it as not to leave him the power to impeach it" (*u*).

Purchaser buys expressly subject to non-existent or voidable interest, bound thereby.

(*q*) *Prettyman's case*, cited in *Walton v. Earl Stanford*, 2 Vern. 279; but the rule seems to be otherwise at law, see *Doe v. Archer*, 1 Bos. & P. 531; so where a mortgage to A. falsely recited an equitable charge in favour of B. and such charge was subsequently created by the owner of the equity of redemption, it was held that A. must stand as first incumbrancer; *Frazer v. Jones*, 5 Ha. 475; affirmed,

12 Jur. 443.

(*r*) See *Neild's case*, cited 1 Moll. 453; and see *Leader v. Ahearne*, 2 Con. & L. 534.

(*s*) *Maguire v. Armstrong*, 2 B. & B. 538, 548.

(*t*) Sug. 1034.

(*u*) Ll. & G. tem. Sug. 215, 216; *Wood v. Marquis of Londonderry*, 10 Beav. 465.

Chap. XV.

In the case last referred to (*w*) where the vendors attempted to set aside leases for their own benefit without the consent of the purchaser of the reversion, *Sugden*, C., held that they had no such equity, and could not impeach the leases unless they could also impeach the sale of the reversion (*x*): this decision was reversed by *Plunket*, C.; he considered *Maguire v. Armstrong* an authority, and as founded on the clearest principles of common sense; he however went on to observe (*y*), that “the purchaser had a right to be secured in his rents by proper covenants in any new leases; this was done in *Maguire v. Armstrong*,” thus admitting the right of the purchaser to have as good a security as he had under the original leases;—and not advertg to the impossibility of determining the relative values of covenants by the lessees and covenants by the vendors (*z*): now *Maguire v. Armstrong* seems to be no authority for disregarding this difference, for the Court there appears (*a*) to have recognized the purchaser’s right to have as good a security as he before had for the rents and covenants, and to have founded its decision upon the assumption (which seems to have been acquiesced in by the plaintiff) that, in the particular case before the Court, the covenants of the defendant might be considered equivalent to the covenants of the lessees. An appeal to the Lords from Lord *Plunkett’s* decision went off upon another point (*b*).

But it seems clear on principle, that if a vendor possess any such right, the substituted security for the rent and

(*w*) *Muskerry v. Chinnery*, Ll. & G. tem. Sug. 185.

(*x*) Ll. & G. tem. Sug. 219.

(*y*) Ll. & G. tem. Pl. 196.

(*z*) “I apprehend that this Court can never enter into the question whether the covenant which binds the assets of the executors and trus-

tees of W. P. is or is not an equivalent for the original covenant by W. P.,” *per* V. C. Shadwell, 16 Sim. 390; and see *Ridgway v. Gray*, 1 Mac. & G. 109.

(*a*) See 2 B. & B. 548.

(*b*) See *Sheehy v. Muskerry*, 7 Cl. & Fin. 1.

covenants should be given to the purchaser before the commencement of litigation against the tenants, and should be binding whatever may be its result: for, "the very litigation might unsettle and ruin the tenant and after all prove unsuccessful" (c).

"Where the consent of a person is essential to the validity of a lease agreed to be granted, and he himself purchases the inheritance with full notice, yet he will not be bound by it" (d): but where land subject to a lease of a way leave at a reserved rent determinable by the lessee, was sold apart from the rent, and the purchaser of the land agreed with the lessee to determine the lease, and entered into a different one, in order to defeat the right of the purchaser of the rent, the latter was held entitled to have it made good out of the new contract (e).

It was held, in a recent case, where a person, having mortgaged in fee, demised the property without the concurrence of the mortgagee, that a purchaser of the fee simple, who by one deed took a conveyance of the legal estate from the mortgagee and of the equity of redemption from the representative of the mortgagor, was not estopped at Law, although he received rent from the tenant; but might eject him after the expiration of the usual notice to quit (f).

Notice of a conveyance which comes within the provisions of the 27 Eliz. c. 4, as being made for the purpose of defrauding purchasers (g), or as reserving a power of

Purchaser of land subject to case—ment may not determine lease of case—ment as against purchaser of rent reserved by lease.

Purchaser of estate in mortgage—when able to dispute voidable leases.

Notice of fraudulent conveyances, &c., immaterial.

(c) *Per Sugden, C., Ll. & G. tem. Sug. 218.*

(d) *Sug. 1032, citing Lufkin v. Nunn, 11 Ves. 170.*

(e) *Wood v. Marquis of Londonderry, 10 Beav. 465.*

(f) *Doe d. Lord Downe v. Thompson, 9 Q. B. R. 1037*; he would have been estopped had the mortgagor got in the legal estate prior to the con-

veyance, and the want of title had not appeared on the face of the lease; see *Right d. Jefferys v. Bucknell, 2 B. & Ad. 278.*

(g) Equitable mortgagee by deposit with memorandum of agreement for a legal mortgage is a purchaser within the Act; *Lister v. Turner, 5 Ha. 281*; *Ede v. Knowles, 2 Y. & C. C. C. 172.*

Chap. XV.

revocation to the grantor (*h*), is immaterial; and the purchaser's title will be good at Law and in Equity.

What are so considered.

It is settled that a mere voluntary conveyance (unless it be in favour of a charity) (*i*), is fraudulent within the meaning of the Statute; *e. g.*, a conveyance in trust for creditors who are not parties to the arrangement (*k*), or a post-nuptial settlement upon the settlor's wife, husband, or family (*l*), unless made in pursuance of a binding (*m*) ante-nuptial agreement (*n*), or of a further portion (*o*), or of an agreement to pay a further portion which is afterwards paid (*p*), or of the wife relinquishing her interests under an existing settlement (*q*), or her jointure or dower (*r*) (if married before the late Act came into operation); and in separation deeds the covenant usually entered into by the trustees to indemnify the husband against her debts, will as against creditors (*s*), and also, it is conceived, as against subsequent purchasers, support any further settlement he may make upon her: so, if a post-nuptial settlement be made with the aid of another person whose concurrence is

(*h*) See sect. 5.

(*i*) *Att.-Gen. v. Corporation of Newcastle*, 5 Beav. 307; 12 Cl. & Fin. 402.

(*k*) *Leech v. Leech*, 1 Ch. Ca. 249; *Wahcyn v. Coutts*, 3 Mer. 707; 3 Sim. 14; *Acton v. Woodgate*, 2 Myl. & K. 492; *Garrard v. Lord Lauderdale*, 3 Sim. 1; *Wilding v. Richards*, 1 Coll. 655; *Smith v. Keating*, 6 C. B. 136; *Simmonds v. Palles*, 2 J. & L. 489; but see *Langton v. Tracy*, 2 Ch. R. 16, and Sug. 929.

(*l*) *Evelyn v. Templar*, 2 Bro. C. C. 148; *Doe v. Roe*, 6 Sco. 525; *Currie v. Nind*, 1 Myl. & C. 17, a case of copyholds settled by a married woman during coverture.

(*m*) See 12 Ves. 74.

(*n*) *Griffin v. Stanhope*, Cro. Jac.

454; *Randall v. Morgan*, 12 Ves. 74; *Ex parte Hall*, 1 Ves. & B. 112; see *Battersbee v. Farrington*, 1 Sw. 106.

(*o*) *Brown v. Jones*, 1 Atk., see p. 190.

(*p*) *S. C.*

(*q*) *Ball v. Burnford*, Prec. in Ch. 113; *Parker v. Carter*, 4 Ha. 409.

(*r*) See Sug. 936.

(*s*) See *Worrall v. Jacob*, 3 Mer. 256; but the introduction of such a covenant is not, as has been often supposed, essential, but any other good consideration will be equally effective; see *Framptou v. Frampton*, 4 Beav. 294; *Wilson v. Wilson*, 14 Sim. 405, affirmed in D. P. 12 Jur. 467.

essential to its full validity—as in the case of a settlement by tenant for life and tenant in tail in remainder—this will, as a general rule, take from the instrument its voluntary character (*t*). Chap. XV.

Marriage is in itself a sufficient consideration for an antenuptial settlement upon the husband, wife, or issue (*u*); which, as against the settlor, or the heirs of the settlor, is good as in favour of collaterals (*v*): but how far limitations in favour of collaterals can be supported as against subsequent *bonâ fide* purchasers for value, appears to be still doubtful. Marriage a sufficient consideration for settlement.

Whether limitations to collaterals are valid.

Unnecessary difficulty appears to have been thrown over the cases upon the subject, by a confusion between the contract and the consideration for the contract: the common form of objection is, that collaterals are “not within the consideration of the marriage” (*w*): now this expression is, it is submitted, scarcely accurate: if A. agreed with B. to pay him 10,000*l.*, in consideration of his conveying his estate to the use of A. for life with remainders over in favour of strangers, and the money were paid, and the conveyance executed accordingly, a question might arise, whether the remaindermen took beneficially or in trust for A., but subsequent purchasers from B. could hardly contend that the limitations in the settlement, *ultra* A.’s life estate, were void upon the ground of the remaindermen not being “within the consideration of the 10,000*l.*” In the case of a marriage settlement, the important questions seem to be, first, whether the collaterals were within the contract? and secondly, whether (if so) there was a sufficient consideration for such a contract?

Upon the first question, (considered merely as one of Such limitations

(*t*) *Myddleton v. Lord Kenyon*, 2 190.

Ves. J. 391; see 410, and cases cited in *Doe v. Rolfe*, 8 Ad. & E., see p. 659; but see also that case, *infra*, 423.

(*u*) See *Brown v. Jones*, 1 Atk.

(*v*) *Davenport v. Bishopp*, 1 Ph. 698; *S. C.*, 2 Y. & C. C. C. 451; in which see the earlier cases cited.

(*w*) 18 Ves. 92.

Chap. XV.

should be considered within the marriage contract—when.

principle,) it is submitted, that where the limitations over are in favour of the collateral relations or connections, not of the settlor, but of the other contracting party, (whether wife or husband,) the settlement itself may be considered *primâ facie* evidence of such other party having stipulated for their insertion: so, where, on a settlement of the intended wife's estate, the limitations over are in favour of her own collateral relations, in derogation from the husband's marital right by survivorship, (in case of personalty,) or as tenant by the curtesy, (in case of realty:) where, in any case, other than that last referred to, the limitations over are in favour of the collateral relations or connections of the settlor, such presumption cannot so readily arise; but it might be proved that the other party stipulated for their insertion: if such a stipulation cannot be presumed or proved, the limitations must, it is conceived, be considered voluntary, and void as against a subsequent *bonâ fide* purchaser.

Nor do the reported cases (*x*) where limitations in a marriage settlement in favour of collaterals have been held invalid, appear to be inconsistent with the above suggestions.

As to the second point—If upon marriage the husband's estate were settled upon the wife, giving her an absolute power of sale and control over the purchase-money, effectually excluding him from any future participation therein and without securing to him the indirect advantage of a permanent provision for her, the marriage, it is conceived, would clearly be a sufficient consideration for such a settlement; although she might at once sell the estate and hand over the purchase-money to her own relations: and, if so, upon what principle can it be contended that the marriage would not equally have been a sufficient consideration for any limitations in favour of such relations,

If within the contract, marriage forms a sufficient consideration to support them, *semble*.

(*x*) See *Osgood v. Strode*, 2 P. Sim. 506; *Stacpoole v. Stacpoole*, 2 Wms. 245; *Johnson v. Legard*, 3 Con. & L. 489. Madd. 283; *Cotterell v. Homer*, 13

which might, upon her stipulation, have been introduced into the settlement? The case of a woman marrying, and stipulating for a provision in favour of parents, or others, who had previously been dependent on her exertions for support, may suggest the hardships which might result from maintaining a contrary doctrine. The impossibility of restoring the consideration by replacing either party in his or her original *status*, is, in itself, a sufficient reason why full effect should be given to any arrangements which were considered to form the equivalent, or part of the equivalent to such consideration (*y*).

And where the settlement is made by a party other than the husband and wife,—as where, on the marriage of a tenant in tail, the tenant for life in possession concurs in barring the entail and re-settling the estate,—the validity of limitations in favour of other branches of the family, or (it is conceived) of strangers, seems to be unquestionable (*z*): so, even the mother of the husband releasing the lands from an annuity, and accepting a substituted security for its payment, has been held a sufficient consideration for limitations in favour of her younger children (*a*). A settlement, not on marriage, by tenant for life and tenant in tail, was, under special circumstances, held void as against a purchaser in a modern case (*b*); but the decision seems to be disapproved of by Sir *E. Sugden* (*c*).

And limitations to collaterals, which precede a limitation in favour of issue of the marriage, will, it seems, be valid (*d*): so, the remoteness of a limitation (*e*), or its

Such limitations supported by necessary concurrence of third person in the settlement;

or by preceding limitations to issue of marriage.

(*y*) See *Jenkins v. Keymes or Keymis*, 1 Lev. 237; where it was held that the wife's marriage portion was a sufficient consideration for limitations to the issue of the husband by a second marriage.

(*z*) See *Jenkins v. Keymes or Keymis*, 1 Lev. 150, 237; *Osgood v.*

Strode, 2 P. Wms., see p. 256; and *Pulvertoft v. Pulvertoft*, 18 Ves. 92.

(*a*) *Roe v. Mitton*, 2 Wils. 356.

(*b*) *Doe v. Rolfe*, 8 Ad. & E. 650.

(*c*) Sug. 935.

(*d*) *Clayton v. Earl Winton*, 3

Madd. 302, n.; and see Sug. 934.

(*e*) 2 P. Wms. 255.

Chap. XV.

being subsequent to a vested estate tail (*f*), may perhaps be sufficient to sustain it.

Settlement by widow, valid.

And a settlement by a widow, before her second marriage, upon her children by a deceased husband, is not fraudulent within the Act; even although they are themselves married and have issue (*g*).

Consideration not expressed may be proved.

A settlement or conveyance, apparently voluntary, may be supported by any evidence, (consistent with its terms,) which proves that it was in fact made for good consideration (*h*): so, although originally voluntary, it may be made good by subsequent matter; *e. g.*, the marriage of the party claiming under it beneficially (*i*)—even although its existence be not shown to have been considered in the marriage treaty (*k*),—or by a sale, for consideration, by the voluntary grantee (*l*); or, probably, (in the case of a creditors' deed,) by the fact of creditors having, upon the faith of it, refrained to enforce their remedies against the debtor (*m*).

Settlement may be supported by matter *ex post facto*.

A settlement "really fraudulent or fraudulently kept on foot" (*n*), would seem to be void as against a *bond fide* purchaser even from the heir or devisee of the settlor (*o*): but a mere voluntary deed cannot, it would appear, be avoided by a sale by the heir (*p*): and, of course, it will not be avoided by a subsequent conveyance apparently made for value but in fact voluntary (*q*).

Whether heir or devisee can set aside voluntary or fraudulent deed.

(*f*) See Sug. 932.

(*g*) *Newstead v. Scarles*, 1 Atk. 265; and see *King v. Cotton*, 2 P. Wms. 674.

(*h*) See Sug. 938; *Pott v. Tothunter*, 2 Coll. 76; *Clifford v. Turrell*, 1 Y. & C. C. 138.

(*i*) *Kirk v. Clark*, Prec. in Ch. 275; *East India Company v. Clavel*, 2 Eq. Ca. Abr. 52, and other cases cited; 5 Bac. Abr. tit. Fraud, C.; *Johnson v. Legard*, Turn. & Russ. 294.

(*k*) See *Brown v. Carter*, 5 Ves. 862, see p. 876.

(*l*) *Prodgers v. Laugham*, 1 Sid. see 134; *George v. Milbanke*, 9 Ves. 190.

(*m*) See *Acton v. Woodgate*, 2 Myl. & K. 492; and see also *Hinde v. Blake*, 3 Beav. 234; and *Kirwan v. Daniel*, 5 Ha. 493; and a very recent case of *Harland v. Binks*, 14 Jur. 979, Q. B.

(*n*) Sug. 928.

(*o*) *Burrell's case*, 6 Rep. 72.

(*p*) *Parker v. Carter*, 4 Ha. 409.

(*q*) *Roberts v. Williams*, 4 Ha. 130.

The 5th sect. of 27 Eliz. c. 4, seems to comprise all settlements, although made for valuable consideration (*r*), which reserve what is, either expressly or virtually, a power of revocation to the settlor; *e. g.*, an unlimited power to charge by way of mortgage (*s*); or a power to revoke on payment of 10s. (*t*), or with the consent of a person nominated by the settlor (*u*): but a power to charge a reasonable specified sum (*w*), or to revoke upon terms which are fairly calculated to preserve the substantial rights of the parties interested under the limitations (*x*), seems to be unobjectionable: and Sir *E. Sugden* expresses an opinion (*y*), that where a settlement made for valuable consideration contains a power of revocation which is afterwards released for valuable consideration, a purchaser, buying subsequently to such release, would be postponed to the settlement: probably the result might be the same although there were no consideration for the release, if the purchaser had notice of it: but a secret release will not affect a purchaser (*z*).

Nor will a purchaser be affected by notice of an equitable claim, if he purchase from a vendor who himself bought *bonâ fide* without notice (*a*). It has been held that, in the case of a charitable trust, want of notice, in order to be effectual, must have existed on the part of the *first* purchaser who held adversely to the trust; and that, if he bought with notice, the want of notice in any subsequent purchaser is immaterial (*b*). This is a doctrine which the Courts would probably be unwilling to

Chap. XV.
Settlements
with power
of revoca-
tion, frau-
dulent.

Purchaser
with notice,
buying from
vendor
without no-
tice, pro-
tected.

(*r*) See Sug. 942.

(*y*) *Ibid.* 943.

(*s*) *Tarback v. Marbury*, 2 Vern. 510.

(*z*) *Buttock v. Thorne*, Moore, 615.

(*t*) See *Griffin v. Stanhope*, Cro. Jac. 455.

(*a*) See *Brandtyn v. Ord*, 1 Atk. 571, and *Lowther v. Carlton*, 2 Atk. 242; *Sweet v. Southcote*, 2 Bro. C. C. 66.

(*u*) *Twyne's case*, 3 Rep. 82 *b*.

(*w*) *Jenkins v. Keymes or Keymis*, 1 Lev. 150.

(*b*) See *East Grimsted case*, Duke's Ch. Uses, 640, A. D. 1633.

(*x*) See Sug. 942.

Chap. XV.

countenance. If trust-property which has been improperly sold finds its way back to the trustee, it becomes re-impressed with the trust, notwithstanding any want of notice on the part of intervening purchasers (c).

Settlements
to defraud
creditor,
void under
13 Eliz. c. 5.

By the 13th Eliz. c. 5, (made perpetual by the 29th Eliz. c. 5), conveyances made of fraud, to the intent to delay, hinder, or defraud creditors, are declared to be void: but the Act is not to extend to conveyances made upon good consideration and *bonâ fide* to persons without notice of the intended fraud (d). A conveyance can, it appears, be set aside as fraudulent against creditors only at the instance of a person who was a creditor at the time; though, when it shall have been set aside, subsequent creditors may be let in (e).

On what
terms pur-
chaser is
evicted in
Equity.

Where a purchaser for value is evicted in Equity, under a prior title, he will be credited with all moneys expended by him in necessary repairs or permanent improvements, (except improvements made after he has discovered the defect of title) (f); and will be debited with the rents which he has received: but, unless guilty of actual fraud or purchasing with notice of an infant's title (g), the account will not extend to such rents as, without his neglect or default, he might have received (h): nor will he be conclusively bound by his admissions in his answers as to receipts (i); nor will annual rests be directed, unless a special case for that form of decree be made on the pleadings (k); and the decree should contain a direction for

(c) *Kennedy v. Daly*, 1 Sch. & Lef.; see p. 379.

(d) Sect. 6; see *Wood v. Dixie*, 7 Q. B. 892; and see, on the general construction of the statute, *Twyne's case*, 3 Rep. 80; 1 Smith's Leading Cases, 1, and cases cited in note, and the late case of *Skarf v. Soulby*, 1 Mac. & G. 364, and cases cited.

(e) *Per V. C. K. B., Ede v. Knowles*,

2 Y. & C. C. C. 178.

(f) See *Kenney v. Browne*, 3 Ridg. P. C. 518; *Clare Hall v. Harding*, 6 Ha. 273.

(g) *Blomfield v. Eyre*, 8 Beav. 250.

(h) *Howell v. Howell*, 2 Myl. & Cr. 478.

(i) S. C.

(k) *Neesom v. Clarkson*, 4 Ha. 97; see *Donovan v. Fricker*, Jac. 165.

just allowances (*l*). In a recent case, where a man completed the purchase of and paid for an estate which his wife had contracted for before marriage, and then sold it without her concurrence, the purchasers upon being evicted by the wife's heir after the husband's death were allowed a lien on the estate for the purchase-money paid by the husband and for moneys expended in lasting improvements from the date of his purchase, with interest; but, accepting this relief, they were treated as mortgagees in possession, and debited with rents received, or which might but for wilful default have been received, during the like period (*m*).

Where the purchase is of the estate of an infant, the purchaser may, it seems, be treated as a bailiff, and be charged with interest on his balances, and with such rents as he might have received but for wilful default (*n*).

If the estate belonged to infant.

Where land vested in trustees upon an express trust is sold by them in breach of trust, the conveyance to the purchaser sets the Statute of Limitations running as against the *cestuis que trust* (*o*); but, as we have already seen (*p*), a much shorter time than the statutory limit will bar a *cestui que trust* who, without reasonable excuse, knowingly neglects to prosecute his claim to the property. In cases of concealed fraud the Statute does not begin to run until the fraud is or might be discovered (*q*).

Statute of Limitations begins to run on conveyance by trustees.

(*l*) *Howell v. Howell*, 2 Myl. & Cr. 478.

(*m*) See *Neesom v. Clarkson*, 2 Ha. 176; 4 Ha. 97; *quære* whether an allowance should not have been made for interest upon the difference between Clarkson's and Syke's purchase-money, the account of rents and pro-

fits being carried back to the date of Syke's purchase?

(*n*) *Blomfield v. Eyre*, 8 Beav. 250; and see *Wyllie v. Ellice*, 6 Ha. 505.

(*o*) 3 & 4 Will. IV. c. 27, s. 25.

(*p*) *Supra*, p. 25.

(*q*) See sect. 26.

(6.) *As to contribution to paramount charges.*

Contribution by purchasers to paramount charge.

Where an estate subject to a paramount charge becomes divided amongst several *bonâ fide* purchasers, it becomes a matter of some difficulty to determine the proportions in which they are to bear it as between themselves. The authorities on the subject will be found stated in full in a learned note by the Editor of Mr. Jarman's work on Conveyancing (*r*), and seem to lead to the following conclusions, viz.

If two estates, X. and Y., are subject to a common charge, and estate X. be sold to A., A. will, as against the vendor and his representatives, have a *primâ facie* equity, in the absence of express agreement, and whether or no he had notice of the charge, to throw it on estate Y. in exoneration of estate X. (*s*).

If, then, estate Y. be subsequently sold to B. with notice of the charge and of the prior sale of X. to A., B. purchases with notice of A.'s equity, and the entire charge must rest upon Y. (*t*).

If B., at the time of his purchase, have notice of the charge as affecting Y., but be not led to suppose that estate X. is also subject to it, or if he purchase without notice of the charge, and A. purchased with notice of the charge as affecting Y., in either of these cases, it is conceived, B.'s equity is inferior to A.'s, and the entire charge must rest upon Y.

If B. purchase with notice of the charge as affecting Y., and with no notice of the sale to A., and be led to suppose that X. is subject to the charge, or if both purchase without notice of the charge, B.'s equity would appear in either case to be equal in degree to A.'s; so that, either

(*r*) Vol. IX. pp. 127 *et seq.*

case was of only *one* estate, see p. 403.

(*s*) The marginal note to *Barnes v. Raester*, 1 Y. & C. C. C. 401, is incorrect; the first mortgage in that

(*t*) See and consider *Hamilton v. Royce*, 2 Sch. & Lef. 315, 328.

party, by taking a transfer of the charge and the securities, (supposing them to be such as to give the incumbrancer a claim at law against the two estates,) would, it is conceived, be able to throw the charge exclusively upon the other (*u*); so, the incumbrancer himself, if able to proceed at Law against the estates, might proceed against the two in such proportions, or against such one only, as he saw fit; and the purchasers, if they had the legal estate, (as might happen in the case of the incumbrance being a rent-charge,) would have no remedy as between themselves; but if their estates were equitable, or if the incumbrancer were obliged to, or did in fact, resort to a Court of Equity for payment of his claim, then, the equities being equal, A.'s would prevail as being prior in date.

(7.) *As to the rights of third parties after conveyance in various cases.*

The Lands Clauses Consolidation Act, 1845, contains provisions which enable the promoters of an undertaking, upon the discovery at any time of the existence of any outstanding estates or interests, to purchase the same compulsorily (*w*).

Provision in Lands Clauses Consolidation Act, 1845, for purchase of interests omitted to be purchased.

In a recent case, where an estate was devised to A. subject to the payment of a legacy,—which was held to charge only the estate and not A. personally,—and A. sold the estate to B. with notice of the legacy, but without any reduction of purchase-money being made in respect thereof, (the parties having determined that the charge was, upon technical grounds, inoperative,) it was held that the legatee could not treat A. as a trustee in respect of so

Estate sold for full value, being in fact subject to a charge known to both parties, but supposed to be invalid, incumbrancer has no claim against vendor for purchase-money.

(*u*) See *Tittley v. Davies*, 2 Y. & C. C. C. 399; and see *Sober v. Kemp*, 6 Ha. 155.

(*w*) See 8 Vict. c. 18, s. 124, *et seq*; as to the effect of a conveyance

of copyholds according to a form prescribed in a private Act, see *Grand Junction Canal Company v. Dimes*, 15 Sim. 402.

Chap. XV.

much of the purchase-money as would answer the legacy (*x*).

Effect of conveyance of equity of redemption to mortgagee.

Where a mortgagee purchases and takes a conveyance of the equity of redemption, he thereby lets in all subsequent incumbrances of which he had notice (*y*).

Mortgagee selling after foreclosure cannot resort to collateral securities.

If a mortgagee, after foreclosure, fairly sell the estate for less than the amount due to him, he cannot afterwards recover from the mortgagor, upon his collateral personal security, the amount remaining unsatisfied (*z*).

Purchaser from mortgagee under power of sale, bound by agreement with mortgagor to allow him to redeem.

A person who having contracted with a mortgagee for the purchase of the property under his power of sale, entered into a subsequent agreement with the mortgagor to allow him to redeem, and then took a conveyance of the property, has been held bound by such agreement (*a*).

Conveyance determines parol licence.

The conveyance, we may remark, puts an end to a parol licence from the vendor to a stranger, to enjoy an easement over the estate; and if he afterwards enter on the land, his ignorance of the sale will be no defence to an action of trespass at the suit of the purchaser (*b*).

Purchaser of part of rent-charge may dis-train.

It would appear that if, upon the purchase of a rent-charge, the same be conveyed to several purchasers, each may distrain upon the tenant before attornment (*c*).

Purchaser when liable for nuisance.

In *Rex v. Peddy* (*d*) it was laid down by *Littledale*, J., that if a man purchase premises with a nuisance upon them, though there be a demise for a term at the time of the

(*x*) *Jillard v. Edgar*, 13 Jur. 1114; and see *Kent v. Newman*, on appeal, *ibid.* 1115; reported on hearing at the Rolls, 1 Mer. 241.

decided in *Mocatta v. Murgatroyd*, 1 P. Wms. 393.

(*z*) *Lockhart v. Hardy*, 9 Beav. 349.

(*y*) *Greswold v. Marsham*, 2 Ch. Ca. 170; *Brown v. Stead*, 5 Sim. 535; and see *Toulmin v. Steere*, 3 Mer. 210; *Smith v. Phillips*, 1 Keen, 694; *quære*, whether the same would be the effect of a mere contract for purchase; see *Watts v. Symes*, 16 Sim. 640, and also the third point

(*a*) *Orme v. Wright*, 3 Jur. 19.

(*b*) *Wallis v. Harrison*, 4 M. & W. 538.

(*c*) *Rivis v. Watson*, 5 M. & W. 255.

(*d*) 1 Ad. & E. see 827; and see *Rosewell v. Prior*, 2 Salk. 460.

purchase, so that he has no opportunity of removing the nuisance, yet by purchasing the reversion he makes himself liable for the nuisance. But if, after the reversion is purchased the nuisance is erected by the occupier, the reversioner incurs no liability. Yet if there were only a tenancy from year to year, or any short period and the landlord chose to renew the tenancy after the tenant had erected the nuisance, that would make the landlord liable. He is not to let the land with a nuisance upon it. But in a late case (*e*) the Court of C. P. held that—although a man may be liable for demising premises when the nuisance exists, or for reletting them after their user has created a nuisance, or for not doing that which he had undertaken to do and which would have prevented the nuisance—yet he is not responsible for the act of his tenant in creating a nuisance by the manner in which he uses the premises—they being such as may or may not become a nuisance.

(*e*) *Rich v. Basterfield*, 4 C. B. 783, 805.

AS TO THE RIGHTS, UNDER THE CONVEYANCE, OF JOINT PURCHASERS, AND PERSONS OTHER THAN THE NOMINAL PURCHASERS.

1. *As to joint purchasers.*
2. *As to purchasers in name of nominal purchaser.*

Purchasers joint-tenants at Law, when so in Equity.

(1.) A CONVEYANCE of land to two or more persons, without words indicating that they are to take as tenants in common, constitutes, at Law, a joint-tenancy (*a*) ; and the rule is the same in Equity, if they advance the money in equal proportions (*b*), and do not purchase as partners, or for the purposes of trade or speculation.

Not if they contribute unequally to purchase-money ;

If, however, two purchase, and one advance more of the purchase-money than the other, there will, in Equity, be no survivorship, although there are no words indicating a tenancy in common (*c*) ; but they will, in the absence of any stipulation to the contrary, be interested in proportion to their shares of the purchase-money. In *Lake v. Gibson* (*d*), the proposition is qualified by the expression, “if the proportions of the money are not equal, and this appears on the deed itself,” and the dictum is thus cited by Sir *E. Sugden* (*e*) : but the rule is laid down by Lord *Hardwicke* without qualification (*f*). It is, however, conceived, that the inequality in the sums advanced, must, to

(*a*) Co. Litt. 180. b.

(*d*) 1 Eq. Ca. Ab. 291.

(*b*) Sug. 901.

(*e*) Sug. 902.

(*c*) *Rigden v. Vallier*, 2 Ves. sen.

(*f*) 2 Ves. sen. 258 ; 3 Atk. 735.

252, 258 ; S. C., 3 Atk. 731, 735.

have this effect, be in accordance with the original or some subsequent express agreement between the parties; and not be the mere result of any temporary pecuniary arrangement at the time of the completion of the purchase (*g*).

Chap. XVI.

So, where land is conveyed to partners as joint-tenants for the purposes of trade, there is no survivorship in Equity (*h*); so, also, if it be conveyed to purchasers, not otherwise in partnership, as joint-tenants, but for the purpose of a joint adventure or speculation (*i*); "the purchase of the land being made to the intent that they shall become partners in the improvement; it being only the substratum for an adventure in the profits of which it was intended they should be concerned" (*k*).

or purchase for the purpose of trade or speculation;

So, if joint-tenants subsequently contract to deal with the property as if in trade, the Court will receive evidence of such a contract; and will hold that there is no survivorship (*l*).

or, being joint-tenants, subsequently agree to hold property as if in trade.

And where partners purchased land out of partnership profits, and *let* it, but brought the profits into the partnership accounts, it was held that there was no survivorship; although the conveyance was to them as joint-tenants (*m*).

And, in the case of a joint-purchase, if one joint-tenant

Joint-tenant has lien

(*g*) See *Wood v. Birch*, Sug. 905.

(*h*) *Morris v. Barrett*, 3 Y. & J. 384; *Elliot v. Brown*, 3 Sw. 489; *Houghton v. Houghton*, 11 Sim. 491.

(*i*) *Lake v. Craddock*, 3 P. Wms. 158; *Lyster v. Dolland*, 1 Ves. jun. 431; *Dale v. Hamilton*, 5 Ha. 369; 2 Ph. 266.

(*k*) *Per Lord Eldon*, 9 Ves. 597.

(*l*) *Jeffereys v. Small*, 1 Vern. 217; see 5 Ha. 384.

(*m*) *Morris v. Barrett*, 3 Y. & J. 384. The share of a deceased partner in the freehold or copyhold estates of the partnership, is not liable to probate duty; *Cstance v. Bradshaw*, 4

Ha. 315. As to the relative rights of his real and personal representatives, the following is stated by Mr. Bisset to be the clear result of the cases: viz. "that in the absence of a specific agreement to the contrary, real estate purchased with partnership funds for partnership purposes, is converted out and out into personal estate, and therefore goes to the personal representative, and not to the heir of a deceased partner; but that real estate purchased with partnership property, but not for partnership purposes, is not converted into personalty." Bisset on Partnership, 56.

Chap. XVI.

on estate
for ex-
penses of
repairs, &c.,
and renewal
fines.

lay out money in repairs or improvements (*n*),—which may be either necessary, or sanctioned by the other joint-tenants—or, in the case of renewable leaseholds, advance money for the expense of a renewal (*o*), he has a lien upon the estate for the amount: but if one purchaser advance more than his share of the purchase-money, he acquires no lien on the estate; nor, it would appear, has he any remedy except a suit for contribution (*p*).

Any advantage secured by purchaser standing as a partner, enures to benefit of his copartners.

On joint-purchase by way of speculation, partner must conform to agreement.

And, where purchasers stand in the relation of partners, any advantage secured by one,—*e. g.*, the renewal of a lease (*q*), or an abatement of incumbrances charged on the property (*r*),—enures to the benefit of the others.

If the land is bought as a speculation—*e. g.*, under an agreement between the partners that it shall be laid out, allotted, and sold for building purposes—no partner can enforce a partition or sale in contravention of the terms of such agreement (*s*): if, however, the management of the concern be entrusted to certain partners, who refuse to execute the duty they have undertaken, the Court will, upon a suit being instituted by another partner, take on itself, so far as it can, to put him in the situation in which he would have been had the trusts been properly performed (*t*).

If conveyance be not taken in names of all the purchasers, trust may be proved by any subsequent writ-

Where, upon an agreement for a joint-purchase, the conveyance is taken in the names of some but not all of the intended purchasers, the interests of the others may be established by any subsequent writing signed by the fiduciary partners, and which acknowledges or proves the existence

(*n*) *Lake v. Gibson*, 1 Eq. Ca. Abr. 291.

(*o*) See *Hamilton v. Denny*, 1 Ball & B. 199.

(*p*) See *Wood v. Birch*, Sug. 905.

(*q*) *Featherstouhaugh v. Fewwick*, 17 Ves. 298; *Clegg v. Fishwick*, 1 Mac. & G. 294.

(*r*) See *Carter v. Horne*, 1 Eq. Ca. Abr. 7, which according to the report was a mere case of a joint-purchase; and see 1 Mac. & G. 300.

(*s*) *Peck v. Cardwell*, 2 Beav. 137; and see *Dale v. Hamilton*, 2 Ph. 266.

(*t*) See 2 Ph. 276.

of the trust (*u*) ; and this, although the agreement be that the one purchaser shall find the money, and the other contribute his skill in purchasing and subsequently allotting and selling the land (*w*) : it seems, however, to be the better opinion (*x*), that the mere fact of one of two parties in treaty for an estate desisting therefrom under a parol agreement that the other shall complete for their joint benefit, is not such a part performance as takes the case out of the Statute of Frauds ; and that, in the absence of any subsequent written admission of the trust, the aggrieved party, unless he can establish a resulting trust, by proof of his having paid or contributed to the purchase-money, has no remedy. There is this distinction between agreements and declarations of trust ; in the one, it is the agreement itself, which is the origin of the interest, that must be in writing : in the case of a declaration of trust, which is only the recognition of a pre-existing interest, it is the evidence and recognition, and not the origin of the transaction which must be in writing (*y*) : and, of course, it is not necessary that the party seeking to enforce the declaration of trust, should himself have been a party to it (*z*).

Chap. XVI.
ing signed
by nominal
purchasers.

(2.) *As to purchases in the name of a nominal purchaser.*

Where, upon a purchase, either by one or several, the conveyance is taken in the names of strangers ; or where, in the case of a joint-purchase, the conveyance is taken in the names of some, but not all, of the purchasers who pay for the estate (*a*), there will,—subject to the exceptions

So, if consideration has been paid by others than nominal purchasers, there will be a resulting trust without writing.

(*u*) *Forster v. Hale*, 3 Ves. 696 ; 275 ; See *Donohoe v. Courahy*, 2 J. S. C., 5 Ves. 308. & L. 688.

(*w*) *Dale v. Hamilton*, 2 Ph. 266. (*z*) 2 Ph. 275.

(*x*) Sug. 907. (*a*) *Wray v. Steele*, 2 Ves. & B.

(*y*) *Per Lord Cottenham*, 2 Ph. 388.

Chap. XVI.

subsequently noticed, and subject, of course, to any express stipulation (even by parol) on the point (*b*),—be a resulting trust in favour of the other parties who have paid or helped to pay the consideration-money : and this, whatever may be the tenure of the estate, or the mode in which the property is conveyed (*c*) ; unless the effect would be to break in upon the policy of an Act of Parliament (*d*) : and no written declaration of trust is necessary ; resulting trusts being expressly excluded from the operation of the Statute of Frauds (*e*). But, it is conceived, the mere fact of the money being so paid, not in pursuance of the original agreement, but either as a matter of necessity, or by virtue of a pecuniary arrangement between the parties at the time of completion, would not have this effect (*f*) : if, for instance, A. and B. agree to purchase an estate, the money as between themselves to be advanced in certain specified proportions, and, at the time fixed for completion, A., either through B.'s temporary inability to pay, or merely for his convenience, advance the entire amount, this, it appears, will not give A. a claim to the whole estate (*g*).

Custom, negating the doctrine of resulting trusts, is bad.

A manorial custom that a nominal purchaser of copyholds shall, notwithstanding the doctrine of resulting trusts, take beneficially unless the trust is mentioned on the Rolls of the Manor, is a bad custom (*h*).

Payment of consideration may be proved by parol evidence.

For the purpose of raising a resulting trust, the mode in which the consideration has been paid may be proved by parol evidence, either during the life of the nominal purchaser, or, according to the weight of authority, after his decease (*i*) ; though whether it can prevail against a direct

(*b*) See *Lady Bellasis v. Compton*, 2 Vern. 294.

(*c*) See *Dyer v. Dyer*, 2 Cox, 92, 93.

(*d*) See Sug. 908.

(*e*) 29 Car. II. c. 3, s. 8.

(*f*) See *Wood v. Birch*, Sug. 905.

(*g*) *S. C.*

(*h*) See *Lewis v. Lane*, 2 Myl. & K. 449, over-ruling *Edwards v. Fiddel*, 3 Madd. 237.

(*i*) See *Sir Thomas Peechy's Case*,

denial in his answer seems to be doubtful (*k*) ; and it will, in any case, be received with great caution : nor can it be received to prove that a person who has paid for the estate with his own money, and taken a conveyance in his own name, was, in fact, the agent of another (*l*) ; or to raise a resulting trust in favour of a vendor who has conveyed the estate without receiving the purchase-money ; even although there be parol evidence to show that the transaction was really a conveyance in trust, and not a sale (*m*). But where such evidence is received it need not be confined to the direct fact of payment : for instance, evidence of the poverty of the nominal purchaser has been allowed in proof of the impossibility of his having paid for the estate (*n*).

And parol evidence is admissible to prove that what purports to be an absolute conveyance, was, in fact, a mortgage (*o*).

Conveyance may be shown to be a mortgage.

As a general rule, no resulting trust arises when the conveyance is taken in the name of a child (*p*), grandchild (*q*) (if the father be dead) (*r*), or wife (*s*) of a sole (*t*) purchaser ; or in the names of several children, either alone (*u*) or associated with the wife (*w*) : and the rule seems to include illegitimate children, if recognised as such (*x*) ; and persons to whom the purchaser has placed himself *in loco parentis* (*y*) ;

But, *prima facie*, there is no resulting trust on purchase in name of wife or child.

Sug. 910 ; *Lench v. Lench*, 10 Ves. 511, 517 ; 2 Mad. Ch. Pr. 141, 3rd edit.

(*k*) Sug. 909.

(*l*) *Bartlett v. Pickersgill*, 1 Cox, 15.

(*m*) *Leman v. Whitley*, 4 Russ. 423 ; Sir E. Sugden puts a query to this case, Sug. 911.

(*n*) *Willis v. Willis*, 2 Atk. 71.

(*o*) *Cripps v. Jee*, 4 Bro. C. C. 472.

(*p*) *Mumma v. Mumma*, 2 Vern. 19 ; *Grey v. Grey*, 2 Sw. 594 ; *Sidmouth v. Sidmouth*, 2 Beav. 447.

(*q*) See *Kilpin v. Kilpin*, 1 Myl. & K. 520 ; *Loyd v. Read*, 1 P. Wms. 607.

(*r*) *Ebrand v. Dancer*, 2 Ch. Ca. 26.

(*s*) *Glaister v. Hewer*, 8 Ves. 199.

(*t*) See *Finch v. Finch*, 15 Ves. 51.

(*u*) *S. C.*, *ib.* 43 ; *Murless v. Franklin*, 1 Sw. 13.

(*w*) *Back v. Andrews*, 2 Vern. 120.

(*x*) See *Beckford v. Beckford*, Loft. 490 ; and see 1 Myl. & K. 542.

(*y*) See *Ebrand v. Dancer*, 2 Ch. Ca. 26 ; *Currant v. Jago*, 1 Col. 261 ; a person may stand *in loco parentis* to

Chap. XVI.

and adult (*z*) as well as infant, and male as well as female children; and to extend to purchases by a female as well as by a male ancestor or *quasi* ancestor (*a*): but not to purchases in the name of a parent (*b*), brother (*c*), or other remoter relative.

Although the purchaser's name be also inserted;

or the nominees take successively.

And, although the point was otherwise decided by Lord *Hardwicke* (*d*), it seems to be the better opinion (*e*) that the same rule will prevail, when, upon a purchase by a father, the conveyance is taken in the joint names of himself and his child (*f*); so, in the case of copyholds, the children take beneficially, although they are named to take in succession after the father (*g*); so, on a purchase by a husband in the joint names of himself and his wife, the latter surviving will take beneficially (*h*); so, if a stranger's name be also inserted, he will, it appears, take as a trustee for the children or wife, (as the case may be) (*i*).

Presumption in favour of advancement may be rebutted by contemporaneous acts or declarations;

But although, where property is purchased in the name of a wife or child, the purchase is, *prima facie*, an advancement, still, the relation between the parties is only evidence of the intention of the purchaser to advance the nominee: which evidence may be rebutted by other evidence manifesting a contrary intention. That cotem-

a child living with and maintained by his Father; *Powys v. Mansfield*, 3 Myl. & Cr. 359; *Pym v. Lockyer*, 5 Myl. & Cr. 29.

(*z*) *Grey v. Grey*, 2 Sw. 594; *Sidmouth v. Sidmouth*, 2 Beav. 456.

(*a*) See *Loyd v. Read*, 1 P. Wms. 607.

(*b*) See *Grey v. Grey*, 2 Sw. 598.

(*c*) *Maddison v. Andrew*, 1 Ves. 57, see p. 61; *Skeats v. Skeats*, 2 Y. & C. C. C. 9.

(*d*) *Stileman v. Ashdown*, 2 Atk. 477, see p. 480.

(*e*) See Sug. 916.

(*f*) *Scroope v. Scroope*, 1 Ch. Ca. 27; *Back v. Andrews*, 2 Vern. 120.

(*g*) *Dyer v. Dyer*, 2 Cox, 92; *Skeats v. Skeats*, 2 Y. & C. C. C. 9, overruling *Dickenson v. Shaw*, 1 Wat. Cop. 222.

(*h*) See *Dummer v. Pitcher*, 2 Myl. & K. 262; and 2 Vern. 120, 683.

(*i*) *Lamplugh v. Lamplugh*, 1 P. Wms. 111; *Crabb v. Crabb*, 1 Myl. & K. 511; and see 1 Myl. & K. 542; see however *Skeats v. Skeats*, *ubi supra*.

poraneous acts (*k*) and even coterporaneous (*l*) declarations of the purchaser, may amount to such evidence, has been often decided (*m*); but subsequent acts and declarations of the purchaser are not evidence to support the trust: although subsequent acts and declarations of the nominee may be so: but, generally speaking, we are to look at what was said and done at the time (*n*).

Thus, where a copyholder, upon taking a purchase in his son's name, at the same Court surrendered it to the use of his own will (*o*); or, taking a purchase in the joint names of himself and two sons, at the same Court took a license to lease for seventy years (*p*), it was held to be no advancement. So, where the purchase is made with some particular object, as to sever a joint-tenancy (*q*). But the general presumption in favour of advancement cannot be negated or qualified by transactions relating to other estates (*r*).

In the case of a child, it is a material circumstance that a provision has been previously made for him; but this is far from being decisive (*s*). In the older cases (*t*) it was held that the child, if already fully advanced, could not take; but, as observed by *Eyre*, L. C. B. (*u*), "the father is the only judge as to the question of a son's provision: the distinction therefore of the son being provided for or not, is not very solidly taken or uniformly adhered to:" and it

Chap. XVI.

but not by subsequent acts or declarations of purchaser;—*aliter* of nominee.

By what coterporaneous acts or circumstances.

Prior advancement of child, whether material.

(*k*) See *Prankerd v. Prankerd*, 1 Sim. & St. 1.

(*l*) Or *previous*; see 1 Myl. & K. 539.

(*m*) 2 Beav. 455; and see *Kilpin v. Kilpin*, 1 Myl. & K. 520, where the declarations were made verbally to the purchaser's solicitor.

(*n*) *Sidmouth v. Sidmouth*, 2 Beav. 447, see p. 455; and see 1 Myl. & K. 532, and 1 Coll. 267.

(*o*) *Prankerd v. Prankerd*, 1 Sim. & St. 1.

(*p*) *Swift v. Davis*, 8 East, 354, n.

(*q*) Sug. 915, citing *Baylis v. Newton*, 2 Vern. 28.

(*r*) *Murless v. Franklin*, 1 Sw. see p. 19.

(*s*) *Per* Lord Brougham, 1 Myl. & K. 542.

(*t*) See *Elliot v. Elliot*, 2 Ch. Ca. 231, A. D. 1677; *Grey v. Grey*, 2 Sw. 600, decided A. D. 1677; and see Sug. 913.

(*u*) See *Dyer v. Dyer*, 2 Cox, 94.

Chap. XVI. has been observed by Lord *Eldon* that "the presumption of advancement in favour of a child is not to be frittered away by nice refinement" (*w*). At any rate, it appears that an advancement which is (*x*), or which the parent considers to be (*y*) only in part, will not rebut the presumption of advancement: a reversion expectant on a life estate, is *primâ facie* only a part advancement (*z*).

By what subsequent acts or circumstances.

A subsequent parol admission by a child that he holds only as trustee, may rebut the presumption in favour of advancement (*a*); but the fact that the child, even although adult, allows the parent to take and keep possession (*b*), is insufficient; nor is the result altered by the child actively assisting the parent in taking the profits; as, in the case of a purchase of stock in the child's name, by his executing a power of attorney for the father to receive the dividends (*c*); or by money being subsequently laid out on the property by the parent (*d*).

Election.

But although, as already noticed, no subsequent act on the part of the purchaser can affect the rights of the nominee, if the presumption in favour of advancement has once arisen, yet a clear devise to another of the estate will raise a case of election against the nominee (*e*).

And where the father of a family has allowed money of his own to be invested in the purchase of an estate, along with other moneys subject to the trusts of his marriage settlement, it will require very strong evidence of intention to show that he did not intend it as an advancement (*f*).

(*w*) See 15 Ves. 50.

see 2 Beav. 456.

(*x*) *Grey v. Grey*, 2 Sw. 600.

(*c*) *Sidmouth v. Sidmouth*, 2 Beav.

(*y*) *Redington v. Redington*, 3 Ridg.

see p. 456.

P. C. 106, see p. 191.

(*d*) *Mumma v. Mumma*, 2 Vern.

(*z*) *Lamplugh v. Lamplugh*, 1 P.

19.

Wms. 111.

(*e*) *Dummer v. Pitcher*, 5 Sim.

(*a*) See 2 Beav. 455; *Scauin v.*

35; 2 Myl. & K. 262.

Scauin, 1 Y. & C. C. C. 65.

(*f*) *Ouseley v. Anstruther*, 10

(*b*) See *Elliot v. Elliot*, 2 Ch. Ca.

Beav. 462.

231; *Grey v. Grey*, 2 Sw. 600; and

A purchase in the name of a child, or, it is conceived, a wife, whether solely or jointly with the purchaser, is not within the 27 Eliz. : and it seems to be the better opinion that, except in cases of actual fraud, such a purchase is not within the 13 Eliz. (*g*).

Chap. XVI.

Purchases in name of child or wife not within the 27th or 13th Eliz.; *semble*.

And even upon a purchase in the name of a stranger, clear parol or other evidence is admissible to rebut the presumption in favour of a resulting trust; and to show that, either as respects the whole or part of the land, or the interest therein, the purchaser intended the nominee to take beneficially (*h*).

On purchase in name of stranger, resulting trust may be rebutted by parol evidence.

Where trustees for the purchase of land, lay out the trust moneys and take the conveyance in their own names, the *cestuis que trust*, in order specifically to claim the lands, must, of course, prove that they were purchased with the trust moneys: this may be proved either by direct evidence,—as where trust money was paid by a trustee by a cheque, which was next day paid over by him in part payment for the estate (*i*),—or by mere parol evidence of declarations by the trustees: but these, in the absence of corroborating circumstances, will be received with great caution (*k*). The presumption, however, is, that a purchase made by a trustee, whose duty is so to invest trust money, has been made in execution of the trust (*l*). And where a trustee paid in trust moneys, (applicable to be invested in the purchase of real estate,) and moneys of his own, to his general account at his bankers', and then bought real estate, and paid for it by a cheque on his bankers, the Court held that such payment was made out of that part

Land purchased with trust-money becomes impressed with trust.

As to proof of application of money.

(*g*) Sug. 916, 917.

& K. 506, 510.

(*h*) See *Maddison v. Andrew*, 1 Ves. S. 57, 61; *Lloyd v. Spillet*, 2 Atk. 148; *Lane v. Dighton*, Amb. 409; *Benbow v. Townsend*, 1 Myl.

(*i*) *Price v. Blakemore*, 6 Beav. 507.

(*k*) Sug. 919.

(*l*) *Ibid*.

Chap. XVI.

of the moneys standing to the general account which it was proper so to apply ; *i. e.*, the trust moneys (*m*).

If purchase
be a breach
of trust
cestuis que
trust can
claim
money or
land.

And where trust moneys are, in breach of trust, invested in the purchase of real estate, the *cestuis que trust* have the option of proceeding either for the money or the estate ; or for a proportionate part of the estate, if the trust fund formed only a part of the consideration money (*n*).

(*m*) *Manningford v. Toleman*, 1 Coll. 670, see p. 674.

(*n*) See *Att.-Gen. v. Corporation of Newcastle*, 5 Beav. 307 ; 12 Cl. & Fin. 402. As to when a purchase is considered to be in performance of a covenant to settle land, see Sug. 920,

and cases cited ; and also the late case of *Ex parte Poole re Symes*, 11 Jur. 1005. As to merger of charges, as between the real and personal representatives of the incumbrancer, on his purchasing the estates, see *Hood v. Phillips*, 3 Beav. 513.

CHAPTER XVII.

Ch. XVII.

REMEDIES AT LAW FOR BREACH OF CONTRACT.

1. *Purchaser's remedies against vendor.*
2. *Vendor's remedies against purchaser.*
3. *Plaintiff how far bound to perform his part of agreement before action.*
4. *As to the agreement—how far affected by parol evidence.*
5. *Production of, when compelled.*
6. *Grounds of defence—the agreement being admitted.*
7. *Action, when restrained in Equity.*
8. *General matters relating to the action.*

(1.) WE have, in the preceding pages, discussed those matters which have appeared most naturally to present themselves for consideration, in cases where an ordinary contract between vendor and purchaser is perfected in the usual way by conveyance of the estate and payment of the purchase-money; without the course of events being disturbed by litigation, either actual or threatened, between the parties. It remains to consider the respective rights and liabilities of the parties, and their representatives, in cases where either party disputes the validity of the contract, or, on other grounds, refuses, neglects, or is unable to perform it; and how such rights and liabilities are varied, by the circumstance of the sale being made under a decree or order of a Court of Equity.

Where there is default on the part of the vendor, the purchaser, as a general rule, may either rescind the

Vendor in
default,
purchaser's

Ch. XVII.

right of
action.

contract and sue for the deposit, as for money had and received ; or may affirm the contract, and sue for damages upon the ground of its non-performance (*a*) ; adding the common money count in respect of the deposit (if any has been paid) : but he cannot, it seems, rescind the contract if the parties cannot be put *in statu quo* ; as where, upon an agreement for a lease, the intended lessee has been in possession and enjoyed part of the term (*b*).

Agents
may sue and
be sued,
when.

Where the contract, not being under seal, has been entered into by an Agent, the principal may sue upon it in his own name (*c*) ; unless the agent be specially described or referred to in the contract, in terms inconsistent with the idea of agency (*d*) : so, also, a purchaser, who has paid the deposit through an agent, can sue for it in his own name, although the fact of the agency were undisclosed (*e*) : and, upon similar principles, it has been held that a nominal agent cannot sue, without first disclosing that he is in fact the principal (*f*) : where an agent contracts apparently on his own account, an action on the contract may be brought against either him or his principal (*g*) : and if the contract be under seal, the agent, although described as such, appears to be personally liable (*h*) ; but if it be not under

(*a*) See *Moses v. Macferlan*, 2 Burr. 1011, and *Dutch v. Warren*, there cited ; *Farrer v. Nightingal*, 2 Esp. 639 ; *Squire v. Tod*, 1 Camp. 293.

(*b*) See *Hunt v. Silk*, 5 East, 449 ; and a like decision has been recently come to where possession had been taken under a contract for sale of the fee simple ; *Blackburn v. Smith*, 2 Exch. R. 783 : but see, *contra*, on the special wording of the agreement, *Wright v. Colls*, 13 Jur. 1056, C. P. : but mere depreciation of the property is no defence, if the purchaser has not had possession : *Wilkinson v. Lloyd*, 7 Q. B. 27.

(*c*) See 5 M. & Sel. 388, 391 ; *Higgins v. Senior*, 8 Mee. & W. see 844 ; *Humphrey v. Lucas*, 2 Car. & K. 152.

(*d*) See *Humble v. Hunter*, 12 Q. B. 310, where the agent was described as "owner."

(*e*) *Duke of Norfolk v. Worthy*, 1 Camp. 337.

(*f*) *Bickerton v. Burrell*, 5 M. & Sel. 383 : but see the remarks of the Court in *Rayner v. Grote*, 15 Mee. & W. 366.

(*g*) *Higgins v. Senior*, 8 Mee. & W. 844 ; *Jones v. Littledate*, 6 Ad. & E. 486.

(*h*) *Appleton v. Binks*, 5 East, 148.

seal, the agent, describing himself as such and naming his principal, is not personally liable unless he had no authority to make the contract, or in making it exceeded his authority (*i*): and even if a person, without authority, contract in the name of and as agent for another, it appears that he cannot be sued on the agreement, unless he be shown to have been really the principal; although he may probably be liable in an action for damages for the misrepresentation (*k*). Where money has been properly received by an agent, the action to recover it must be brought against the principal (*l*): but a sum paid to an agent, under protest, in respect of a wrongful claim, may, it appears, be recovered from the agent (*m*).

In an action for money had and received, rescinding the contract, interest upon the deposit may, under a late Act, be recovered from such time as demand of payment was made in writing giving notice to the vendor that interest would be claimed from the date of the demand until payment (*n*); but it does not appear to be otherwise recoverable (*o*). Of course, the purchaser can make no claim in respect of any increase in the value of the estate; and it would seem, upon principle, to be equally clear that he cannot be prejudiced by any diminution in its value; although some old authorities leave the point doubtful (*p*).

In an action for damages, affirming the contract, the purchaser, if the contract be proved to have been binding

What purchaser can recover in action after rescinding contract.

What he can recover in action for damages

(*i*) *Downman v. Jones*, 9 Jur. 454, Exch. Ch.

(*k*) *Jenkins v. Hutchinson*, 13 Jur. 763; 18 L. J. 274, Q. B.

(*l*) *Duke of Norfolk v. Worthy*, 1 Camp. 337, and *Edden v. Read*, 3 Camp. 339; *Bamford v. Shuttleworth*, 11 Ad. & E. 926; *Hurley v. Baker*, 16 Mee & W. 26: but, as we have seen (*supra* 82) an auctioneer is liable to be sued for the deposit;

his character being rather that of stakeholder than of a mere agent of the vendor.

(*m*) *Smith v. Sleep*, 12 Mee. & W. 585.

(*n*) See 3 & 4 Will. IV. c. 42, s. 28.

(*o*) *Fruhling v. Schroeder*, 2 Bing. N. C. 77.

(*p*) See Sug. 256.

Ch. XVII.
founded on
contract.

upon the vendor, can, (under special counts,) recover his expenses of investigating the title (*q*), of searching for incumbrances, and comparing the abstract with the deeds (*r*), of preparing the conveyance, (if the sale go off by reason of a concealed incumbrance) (*s*), and interest upon his deposit (*t*), and upon the residue of his purchase-money, if lying idle (*u*) ; and he may recover the deposit itself under a common money count : nor will a Court of Equity, pending a suit by the vendor for specific performance, grant an injunction to restrain an action for the deposit (*w*), unless the vendor consent to its coming into Court (*x*) ; but he cannot recover expenses incurred prior to the contract, or the costs of a survey (*y*), or of preparing a conveyance (*z*), (except under special circumstances,) or any allowance for loss by selling out of the funds (*a*), or for money laid out in repairs (*b*) or improvements (*c*), or the difference between his costs taxed as between party and party and his costs as between solicitor and client in an unsuccessful suit by the vendor for specific performance (*d*), or the costs of a suit by himself (the purchaser) for specific performance when the bill is dismissed without costs on the Master reporting against the title (*e*).

(*q*) Including costs due, but not actually paid to his solicitor, *Richardson v. Chasen*, 10 Q. B. 756 : and a letter from the purchaser's solicitor to the vendor's solicitor stating that unless certain evidence is supplied, and which is not supplied, the purchase must go off, does not affect the right to recover such expenses; *Hall v. Betty*, 5 Scott, N. R. 508.

(*r*) *Hodges v. Lord Litchfield*, 1 Bing. N. S. 492.

(*s*) Sug. 427.

(*t*) *Hodges v. Lord Litchfield*, *ubi supra*.

(*u*) *Sherry v. Oke*, 3 Dowl. P. C. 349, 361.

(*w*) *Tanner v. Smith*, 4 Jur. 310.

(*x*) *S. C. Annesley v. Muggridge*, 1 Madd. 593.

(*y*) *Hodges v. Lord Litchfield*, *ubi supra*.

(*z*) *S. C.*

(*a*) *Flureau v. Thornhill*, 2 W. Bla. 1078.

(*b*) *Brett v. Ellis*, Sug. Append. No. 4.

(*c*) *Worthington v. Warrington*, 18 L. J., N. S., C. P. 350.

(*d*) *Hodges v. Lord Litchfield*, *ubi supra*.

(*e*) *Malden v. Fyson*, 11 Q. B. 292.

As a general rule, a purchaser is only entitled to nominal damages for the loss of his bargain, where the vendor, through want of title or otherwise (*f*), is *bonâ fide* (*g*) unable to convey the estate (*h*); and where a purchaser, upon the delivery of an abstract showing an apparently good title, resold at a profit, and it subsequently appeared, on comparing the abstract with the deeds, that the title was defective, he was not allowed the expenses of the resale; there being nothing more on the part of the vendor than negligence in the preparation of the abstract, and the purchaser himself being equally negligent in reselling before he had tested its accuracy (*i*). If, however, there be actual *mala fides* (*k*) on the part of the vendor, or (it would appear,) if he sell the estate under the *knowledge* that he is not in a position to insure a title, the case may be different; *e.g.*, where A. having a mere agreement for the purchase of an estate, sold it to B., who resold it at a profit to C., and then the whole matter went off through a want of title in the original vendor, it was held that B.'s claim was not to be restricted to nominal damages (*l*); it does not, however, appear upon what principle the damages were assessed (*m*).

Ch. XVII.

No damages for loss of bargain, unless under special circumstances.

Upon the death of the purchaser, the right to sue in respect of any damages which may have been sustained by his personal estate,—*e.g.*, loss of interest on the deposit, or the expenses of investigating the title,—descends upon his personal representative (*n*); and no action upon the

Death of purchaser, right of action goes to personal representatives.

(*f*) See *Tyrer v. King*, 2 Car. & K. 149: a case of a sale by an agent after the estate had been sold by his principal.

(*g*) See 10 B. & C. 416, 421.

(*h*) *Flureau v. Thornhill*, *ubi supra*; and see *Clare v. Maynard*, 6 Ad. & E. 519.

(*i*) *Walker v. Moore*, 10 B. & C. 416.

(*k*) *S. C.*

(*l*) *Hopkins v. Grazebrook*, 6 B. & C. 31; *Robinson v. Harman*, 1 Exch. 850; but see *Brett v. Ellis*, Sug. Append. No. 4.

(*m*) See 10 B. & C. 420; and see *Worthington v. Worthington*, 18 L. J., N. S., C. P. 350.

(*n*) *Orme v. Broughton*, 10 Bing. 533.

Ch. XVII.

agreement can be brought by the heir (*o*) : but his only resource is a Suit in Equity.

Death of
vendor, pur-
chaser's
right of ac-
tion against
his repre-
sentatives.

Upon the death of the vendor, his personal representatives alone are liable to an action at law, if, as is usually the case, the agreement is not under seal.

(2.) *Vendor's remedies at Law against purchaser.*

Right of
action in
vendor or
his repre-
sentatives,
against pur-
chaser or
his represen-
tatives, for
breach of
contract.

Upon default by the purchaser, the vendor, or, if he be dead, his personal representatives, can sue the purchaser, or, if he be dead, his personal representatives, or his real representatives, if the agreement were under seal, and the heirs were named therein, for damages sustained by the breach of the contract (*p*).

Vendor
cannot
recover
entire
purchase-
money, if no
conveyance.

Where a purchaser has been let into possession, and refuses to complete, the vendor cannot, if no conveyance has been executed, recover from him the whole amount of the purchase-money, but only the damages actually sustained by the breach of contract (*q*) ; this right of action is not taken away by a stipulation that if the purchaser shall fail to comply with any of the conditions the deposit shall be forfeited as liquidated damages (*r*).

Purchaser
in posses-
sion, whe-
ther liable
for use and
occupation
if no title.

If the purchase go off through defect of title in the vendor, the purchaser, if he have been let into possession, cannot be sued for use and occupation for the time during which the contract was pending, although the occupation have been a beneficial one (*s*) : in the two principal reported cases it appears that the purchaser had paid, in one case all, and in the other part, of the purchase-money ;

(*o*) Sug. 259.

(*r*) *Icely v. Greiv*, 6 Nev. & M.

(*p*) *Vide supra*, p. 376, as to the liability of the heir and devisees upon the covenant.

467.

(*s*) *Kirtland v. Pounsett*, 2 Taunt. 145 ; *Winterbottom v. Ingham*, 7

(*q*) See *Laird v. Pim*, 7 M. & W. 474.

Q. B. R. 611.

but although this was in some degree relied on in the earlier, it does not seem to have been considered material in the later, of the two decisions: but if, after the contract is clearly abandoned, he retain possession, he will be liable in respect of such subsequent occupation (*t*). But the purchaser when let into possession, (unless under an agreement to quit in some specified event which has happened (*u*),) cannot be ejected without notice (*w*).

(3.) *Plaintiff how far bound to perform his part of the agreement before action.*

As a general rule, the mutual engagements of the parties will be considered dependent on each other; and either must, (unless discharged therefrom by the other,) (*x*) perform his liabilities before he seeks to enforce his rights under the contract. So that, on the one hand, the purchaser cannot sue upon the agreement without tendering the conveyance (*y*), and the sum, (if any,) due in respect of the purchase-money and interest (*z*);—(unless the vendor have neglected to furnish or verify (*a*) his abstract of title, or have shown a bad title (*b*), or, by conveying away the estate (*c*) or otherwise (*d*), have disabled himself from completing the contract:)—and, on the other hand, it has been held that the vendor, if he sue merely upon the

Performance of contract on part of plaintiff how far necessary to support action.

(*t*) *Howard v. Shaw*, 8 Mee. & W. 118. 190.

(*z*) Sug. 375.

(*u*) *Doe v. Sayer*, 3 Camp. 8.

(*a*) See *Berry v. Young*, 2 Esp.

(*w*) See 1 M. & W. 700; *Right v. Beard*, 13 East, 210; and see *Doe v. Caperton*, 9 Car. & P. 112; *Doe v. Chamberlaine*, 5 Mee. & W. 14.

640, n.

(*b*) See *Seaward v. Willock*, 5 East, 202.

(*x*) See *Jones v. Barkley*, Doug. 659; *Laird v. Pim*, 7 Mee. & W. 474: if the agreement is by deed, the discharge must also be under seal; see 19 L. J., N. S., Exch. Ch. 328.

(*c*) *Lovelock v. Franklyn*, 8 Q. B. R. 371; *Knight v. Crockford*, 1 Esp. 190.

(*y*) See *Knight v. Crockford*, 1 Esp.

(*d*) See *Caines v. Smith*, 15 M. & W. 189; *Short v. Stone*, 3 Dow. & L. 580; *S. C.*, 8 Q. B. 358.

Ch. XVII.

agreement and not upon some security which he has taken for the purchase-money (*e*), must have executed, or offered to execute (*f*), or, according to a modern decision (*g*), have been ready and willing to execute a conveyance in the terms of the contract; the rule, in the absence of stipulation, being, that the purchaser must prepare and tender the conveyance.

But, of course, the contract *may* be so worded as to show that the mutual stipulations were, to a certain extent, independent; it being a general rule, that if a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act, before performance: for it appears that the party relied on his remedy, and did not intend to make the performance a condition precedent (*h*): for instance, where a vendor agreed that he would, within one month from the date of the contract, or from being required so to do, deliver an abstract of title and deduce a clear title, and the purchaser agreed to pay part of the purchase-money down, and the residue on or before four years after date, with interest payable half-yearly on certain fixed days, it was held, that the vendor could sue for interest which had become due, although no abstract might have been delivered (*i*).

(*e*) See *Moggridge v. Jones*, 14 East, 486; *Spiller v. Westlake*, 2 B. & Ad. 155.

(*f*) *Phillips v. Fielding*, 2 H. Bl. 123; *Laird v. Pim*, 7 M. & W. 474.

(*g*) *Poole v. Hill*, 6 M. & W. 835, 841; and see Chitty on Contracts, last ed. 273, and *Thames Haven Com-*
pany v. Brymer, 19 L. J., N. S.,

Exch. Ch. 321; but see Sug. 261, where *Poole v. Hill* is not cited.

(*h*) *Portage v. Cole*, 1 Wms. Saund. 320 b, n.; see 6 C. B. 114; *Mattock v. Kinglake*, 2 Per. & Dav. 343; *Porcher v. Gardner*, 14 Jur. 43; and *Thames Haven Company v. Brymer*, 19 L. J., N. S., Exch. Ch. 321, 328.

(*i*) *Dicker v. Jackson*, 6 C. B. 103, 114; and see *Sibthorp v. Brunel*, 3

And an actual refusal by the vendor to execute the conveyance, has been held to be no defence at Law to an action by him upon a note or other security given by the purchaser for the purchase-money (*j*). It seems to be the better opinion, that, even where there is no condition respecting the forfeiture of the deposit, and the purchaser by his own default loses his right to enforce the contract, he has no right to recover his deposit, and will not acquire such right by reason of the estate being subsequently sold by the vendor (*k*).

Ch. XVII.

Refusal by vendor to convey, no defence to action on note for securing purchase-money.

(4.) *As to the agreement ;—how affected by parol evidence.*

We have already considered (*l*) what is a sufficient agreement within the Statute of Frauds: we may here remark, that the doctrine acted upon in Courts of Equity as to parol agreements being taken out of the Statute by part performance, is not recognised by a Court of Law (*m*).

What is a sufficient contract within the Statute of Frauds.

The contract, as originally entered into, cannot, at Law, be altered by evidence of a parol variation in favour of either plaintiff or defendant (*n*).

No parol variation of contract allowed at Law.

As respects the reception of parol evidence in order to explain agreements of doubtful or ambiguous meaning, the following seems to be the general result of the authorities: the Courts will always, if necessary, receive evidence to enable them to decipher, or, if written in a foreign language, to interpret, the instrument; that is, to ascertain what are the expressions, or the English equivalents to

Parol evidence how far admissible in explanation of contract.

Exch. 826; and, in equity, *Lloyd v. Lloyd*, 2 Myl. & Cr. 192.

v. Temple, 1 Per. & Day. 379.

(*l*) *Supra*, Ch. VII.

(*j*) *Moggridge v. Jones*, 14 East, 486; but see the remarks of Parke, J., in *Spiller v. Westlake*, 2 B. & Ad. 155, 157.

(*m*) Sug. 140.

(*n*) See *Goss v. Lord Nugent*, 5 B. & Ad. 58; *Henson v. Coope*, 3 Sco. N. R. 48.

(*k*) See Sug. 41; but see *Palmer*

Ch. XVII.

the expressions, which the parties have actually used : they will also receive parol evidence of the meaning which local custom (*o*), or professional or trade usage (*p*), has attached to particular expressions ; so as, in fact, to ascertain what is, (with reference to the particular subject-matter of the contract,) their strict and primary meaning (*q*) ;—unless such a construction would be inconsistent with the terms of the instrument (*r*), or some express provision of the Legislature ; for instance, local custom cannot vary the statutory meaning of expressions referring to weights and measures (*s*) ;—or to annex any customary incidents to the contract which are not expressly or impliedly excluded by the terms of the written instrument (*t*) : where construing the expressions according to such strict and primary meaning would render them insensible with reference to extrinsic circumstances, the Courts will receive parol evidence of the circumstances and situation of the parties, and the state of the property at the date of the agreement, for the purpose of ascertaining whether such expressions have not been used in some secondary sense consistent with such circumstances, &c. (*u*) : and where, as respects all or any part of the subject-matter of the contract (*w*),

(*o*) *Smith v. Wilson*, 3 B. & Ad. 728 ; *Doe v. Benson*, 4 B. & Ald. 588, where evidence was admitted to show that by Lady day was meant old Lady day.

(*p*) *Clayton v. Gregson*, 4 Nev. & M. 602 ; *Hutchison v. Bowker*, 5 M. & W. 535 ; and see *Lewis v. Marshall*, 8 Sc. N. R. 477, 493 ; *Sotilichos v. Kemp*, 3 Exch. 105.

(*q*) See *Colpoys v. Colpoys*, Jac. 463 ; *Simpson v. Margitson*, 11 Q. B. 23 ; *Doe v. Langton*, 2 B. & Ad. 695 ; *Doe v. Birch*, 1 M. & W. 402 ; *Parker v. Gossage*, 2 Cr.M. & R. 617.

(*r*) See 19 L. J., N. S., C. P. 295.

(*s*) See *Master, &c. of St. Cross v. Lord Howard De Walden*, 6 Durn. & E. 338.

(*t*) *Hutton v. Warren*, 1 M. & W. 466 ; *Syers v. Jonas*, 2 Exch. 111 ; *Spartali v. Benecke*, 19 L. J., N. S., C. P. 293.

(*u*) See *Eden v. Earl of Bute*, 3 Bro. P. C. 679 ; *Allen v. Cameron*, 1 Cr. & Mee. 832 ; *Simpson v. Henderson*, M. & Malk. 300 ; and *Shore v. Wilson*, 9 Cl. & F. 355.

(*w*) *Longchamps v. Fawcett*, Peak. Ca. 101 ; *Doe v. Burt*, 1 Durn. & E. 761 ; *Jones v. Newman*, 1 W. Bla. 60.

or the identity of places, documents (*x*), or persons (*y*) referred to, there is a *latent* ambiguity; that is, where the words of the agreement, although certain in point of grammatical construction and apparently definite, are rendered of doubtful application by circumstances which appear *aliunde* (*z*), or, according to a modern decision (*a*), upon the face of the agreement itself, parol evidence of the *intention* of the parties at the date of the agreement is admissible, in order to identify the estate, document, plan, or other thing or person intended; but such evidence is not admissible in aid of a *patent* ambiguity; *i. e.*, an ambiguity which is either directly suggested by the terms of the instrument (*b*), or is occasioned by the grammatical uncertainty of the expressions therein used.

Evidence of intention, when admissible.

(5.) *Production of agreement, when compelled.*

If the only executed copy of the agreement is in the hands of a defendant (*c*), or of a third party (*d*), either party can, as of course, procure an order, before trial, for its previous production for the purpose of inspection and of being stamped; and where the sole uncopied original was surreptitiously obtained from the plaintiff by the defendant who swore that he had lost it, he was ordered to produce a copy for the purpose of being stamped, and was precluded from setting up the unstamped original (*e*); but this has been overruled in a very recent case (*f*).

Production of contract, when ordered.

(*x*) *Hodges v. Horsfall*, 1 Russ. & Myl. 116.

(*y*) See *Doe v. Westlake*, 4 B. & Ald. 57.

(*z*) *Doe v. Morgan*, 1 Cr. & Mee. 235.

(*a*) *Doe d. Gord v. Needs*, 2 Mee. & W. 129; and see *Colpoys v. Colpoys*, Jac. 464.

(*b*) See *Brodie v. St. Paul*, 1 Ves. jun. 326; and see 1 Sch. & Lef. 36.

(*c*) *Blakey v. Porter*, 1 Taunt. 386; *King v. King*, 4 Taunt. 666; *Hall v. Bainbridge*, 3 Dowl. & L. 92.

(*d*) *Gigner v. Bayly*, 5 Moore, 71.

(*e*) *Bousfield v. Godfrey*, 5 Bing. 418; and see, in Equity, *Blair v. Ormond*, 1 De G. & S. 428; *Smith v. Henley*, 1 Phil. 391.

(*f*) *Bankin v. Hamilton*, 14 Jur. 930.

Ch. XVII. Where two original copies are retained, one by each party, the party who loses his copy, cannot, at Law, compel the other party to produce his copy at the trial, or for the purpose of inspection; but is driven to a Bill of discovery (*f*): whether a Court of Law will compel its production for the mere purpose of stamping, seems to be doubtful (*g*).

(6.) *Grounds of defence at Law, the agreement being admitted.*

Grounds of
defence to
action on
contract
duly exe-
cuted.

Supposing the agreement and its breach to be *prima facie* capable of proof against the defendant, he may, by way of defence to the action, show, either that the agreement was originally invalid, or that it has since its execution ceased to be binding, or that satisfaction has been made for its breach.

Original
invalidity of
contract;

For instance, he may show that, at the time of the execution of the contract, he was under some personal incapacity to contract (*h*); or was under duress (*i*); or was fraudulently induced to enter into it (*k*); or that it was entered into for or with reference to some unlawful purpose (*l*).

or subse-
quent wai-
ver

So, admitting its original validity, he may show that it has been since avoided by having without his concur-

(*f*) See *Street v. Brown*, 6 Taunt. 302.

(*g*) See *Travis v. Collins*, 2 Cro. & Jer. 625; *Neale v. Swind*, 2 Cro. & Jer. 278. See Mr. Tilsley's remarks, Tils. on S. L. p. 386.

(*h*) *Supra*, Ch. I.

(*i*) Bac. Abr. tit. Duress.

(*k*) See *Haigh v. De La Cour*, 3 Camp. 319; *Emanuel v. Dane*, *ib.* 299; *Solomon v. Turner*, 1 Stark. 51; *Hutchinson v. Morly*, 7 Scott, 341; *Cornfoot v. Fowke*, 6 Mee. & W. 358; actual fraud in the agent is the

same as fraud in the principal, *Doe d. Willis v. Martin*, 4 Durn. & E. 39; *Wilson v. Fuller*, 3 Q. B. 68.

(*l*) *Bartlett v. Vinor*, Carth. 252; *Langton v. Hughes*, 1 M. & S. 596; *De Begnis v. Armistead*, 10 Bing. 107; *Gas Light Company v. Turner*, 8 Scott, 609; *Ritchie v. Smith*, 6 C. B. 462; and see *Ewing v. Osbaldiston*, 2 Myl. & Cr. 53; and note, anything to which a Statute attaches a penalty is unlawful, although not expressly prohibited; and see *Appleton v. Campbell*, 2 Car. & P. 347.

rence been altered by the plaintiff in a material part (*m*) ; or by a waiver in writing duly signed by the plaintiff (*n*) before the breach which is relied on in the action (*o*) : Sir *E. Sugden* holds it to be the better opinion that a verbal waiver of a written agreement is no defence at Law (*p*) ; but the reported cases, although they leave the point doubtful, seem rather to lead to a contrary conclusion (*q*) : and the Statute of Frauds seems merely to take away the remedy by action in the case of a verbal contract, without saying anything to affect the common-law right of waiving by word of mouth a contract not under seal.

So, the defendant, admitting the agreement and its breach, may show that the plaintiff has executed a release under seal ; or has accepted something in satisfaction of the breach (*r*) ; or has already recovered damages in an action upon the agreement (*s*) ; or that the action has not been brought within the time allowed by the Statutes of Limitation.

or release ;

or satisfaction.

(7.) *Action, when restrained in Equity.*

Equity will restrain an action at Law which is inconsistent with a prior decree between the parties in a suit for specific performance (*t*) ; or an action by a vendor whose bill for specific performance has been dismissed for want of title (*u*) ; but, in general, the dismissal

Action, when restrained in Equity.

(*m*) *Supra*, p. 118.

(*n*) See *Goss v. Lord Nugent*, 2 Nev. & M. 28 ; *Harvey v. Grabham*, 6 Nev. & M. 754, 762.

(*o*) Where a right of action has actually arisen, this can be discharged only by a release under seal or by the acceptance of something by way of satisfaction ; *Willoughby v. Backhouse*, 2 B. & Cr. 821, 824 ; see *Baylis v. Usher*, 4 Moo. & P. 791.

(*p*) Sug. 174.

(*q*) See *Goss v. Lord Nugent*, 5 B. & Ad. 58, 66 ; *Harvey v. Grabham*, 6 Nev. & M. 754, 762 ; and *Stead v. Dawber*, 10 Ad. & El. 57, 65.

(*r*) *Willoughby v. Backhouse*, 2 B. & C. 821, 824 ; *Baylis v. Usher*, 4 Moo. & P. 791.

(*s*) See 10 Bing. 538.

(*t*) *Reynolds v. Nelson*, 6 Madd. 290.

(*u*) *M'Namara v. Arthur*, 2 Ball & B. 353.

Ch. XVII.

of the vendor's bill does not interfere with his right to bring an action (*w*) ; nor is it necessary, although it is usual, to state in the decree that the dismissal is without prejudice to the legal right (*x*). So, if a plaintiff is proceeding at Law and in Equity for the same subject-matter, Equity will require him to elect between his remedies (*y*) : but, as we have seen, a Court of Equity will not, pending a suit by the vendor for specific performance, restrain a purchaser from bringing an action for the deposit (*z*) ; except, perhaps, on the terms of the money being paid into Court (*a*).

(8.) *General matters relating to the action.*

Particulars
of claim.

In an action by the purchaser for non-performance of the agreement, the vendor can require to be furnished with a particular of all matters of fact, (but not of Law,) which the plaintiff means to rely on as constituting non-performance (*b*) ; but, if this be not obtained, the latter may prove any matter amounting to a breach of the agreement ; and is not restricted by statements which he may previously have made to the vendor (*c*).

Time is, at
Law, essen-
tial.

At Law, time is of the essence of the contract (*d*) ; so that the delay of a single day after the time fixed for the delivery of the abstract, or deducing and verifying a marketable title, gives to the purchaser an immediate right of action ; nor can time, at Law, be varied or enlarged by word of mouth (*e*) : and where a time is fixed

(*w*) Sug. 256.

(*x*) See 2 Ball & B. 353.

(*y*) *Infra*, p. 460.

(*z*) *Tanner v. Smith*, 4 Jur. 310,
Chan.

(*a*) *S. C., Annesley v. Muggridge*,
1 Madd. 593.

(*b*) See *Collett v. Thompson*, 3
Bos. & P. 246 ; *Roberts v. Rowlands*,

3 Mee. & W. 543.

(*c*) *Squire v. Tod*, 1 Camp. 293 ;
Sug. 428 ; but see *Todd v. Hoggart*,

1 Moo. & Malk. 128.

(*d*) *Berry v. Young*, 2 Esp. 640, n.

(*e*) *Marshall v. Lynn*, 6 Mee. &
W. 109 ; *Stead v. Dawber*, 10 Ad. &
El. 57.

for completion, and the vendor fails to deduce and verify a marketable title before that time, or if, no time being fixed for completion, he deduces a defective title and the contract is rescinded while the title remains defective, his having a good title at the time of trial will be no defence to the action (*f*): but if *no* time be fixed for completion, the vendor will be entitled to “a reasonable time” for making out his title (*g*): and if, in such case, the purchaser do not apply for the title before bringing an action, it is sufficient if the vendor can make a good title at the time of trial; his having had a defective title, at the date of the contract, is immaterial (*h*).

Lastly, we may here remark, that a Court of Law will consider equitable, as well as legal, objections to the title (*i*).

Equitable objections to title a defence at Law.

(*f*) See *Dobell v. Hutchinson*, 3 Ad. & El. 355; *Bartlett v. Tuchin*, 6 Taunt. 259; *Roper v. Coombes*, 6 B. & Cr. 534; *Seaward v. Willock*, 5 East, 198.

(*g*) *Sansom v. Rhodes*, 8 Sc. 544.

(*h*) *Thomson v. Miles*, 1 Esp. 184.

(*i*) Sug. 532, and cases cited; and see *Neeves v. Burrage*, 14 Jur. 177, Q. B.

AS TO SPECIFIC PERFORMANCE.

1. *Matters relating to the jurisdiction generally.*
2. *By whom specific performance may be enforced.*
3. *Against whom it may be enforced.*
4. *As to the parties to the suit.*
5. *As to the Bill.*
6. *As to proceeding by claim under the Orders of April, 1850.*

7. *As to how the plaintiff's case may be sustained in the absence of a written agreement—fraud—part-performance—admission by Defendant of parol agreement—parol variation of written agreement.*

8. *As to grounds of defence negating plaintiff's right to specific performance except with a variation of the original agreement; viz., fraud—mistake—surprise—misrepresentation—unfulfilled promise—parol variation, &c.*

9. *As to grounds of defence negating in toto plaintiff's right to specific performance; viz., personal incapacity—nature of contract, or fraud, &c. &c., attending its execution—matters relating to the estate—title—or consideration—plaintiff's conduct, &c. after contract—election of other remedy.*

10. *As to the proceedings in the suit; viz., payment of purchase-money into Court—reference of title and proceedings thereon—decree for plaintiff—conveyance—decree dismissing bill.*

11. *As to costs.*

Specific performance
the only

(1.) THE only remedy to be obtained in Equity for the non-performance of the contract, is a decree for specific

performance (*a*) : at one time there was a floating idea in the profession that the Court might award compensation for non-performance, in the event of the primary relief failing ; but the contrary has been settled by modern decisions (*b*) : nor does it make any difference that compensation is sought, not against the owner of the estate, but against a person who falsely assumed authority to sell (*c*).

Ch. XVIII.
remedy in
Equity.

The Court of Review, (or now the Court of Bankruptcy,) cannot enforce specific performance against a purchaser who has not expressly submitted himself to the Jurisdiction (*d*) ; nor, perhaps, even against one who is willing so to submit himself (*e*).

Court of
Bankruptcy
cannot en-
force speci-
fic perform-
ance, *semble*.

The principle by which Courts of Equity have professed to be guided in decreeing specific performance of a contract for purchase, is, that damages at Law may not, in the particular case, afford a complete remedy (*f*) : they will, therefore, decline to interfere if the subject-matter of the contract be such that both vendor and purchaser would be reimbursed by damages ; as on an ordinary agreement for the sale of Stock (*g*) : in the case of land, the purchaser's right to sue can never be questioned upon this ground ; for the land may, to him, have "a peculiar and special value" (*h*) : it is more difficult to understand why the Courts should entertain a suit by a vendor, who, the title

Inadequacy
of damages
the princi-
ple on which
specific per-
formance is
decreed.

But, on
ground of

(*a*) Specific performance of contract for sale or purchase of Railway shares will be enforced ; *Duncuft v. Albrecht*, 12 Sim. 189, affirmed 199 ; *Shaw v. Fisher*, 12 Jur. 152 ; *Wynne v. Price*, 13 Jur. 295.

(*b*) *Todd v. Gee*, 17 Ves. 273 ; *Sainsbury v. Jones*, 5 Myl. & Cr. 1, see p. 3.

(*c*) *Sainsbury v. Jones*, 5 Myl. & Cr. 1.

(*d*) *Ex parte Cutts*, 3 Dea. 242,

overruling *Ex parte Gould*, 1 G. & J. 231 ; *Ex parte Sidebotham*, 3 D. & C. 818 ; and *Ex parte Barrington*, 4 D. & C. 461.

(*e*) See *Ex parte Bennett*, 10 Ves. 382.

(*f*) See *Adderley v. Dixon*, 1 Sim. & St. 610.

(*g*) *Cud v. Rutter*, 1 P. Wms. 570 ; *Nutbrown v. Thornton*, 10 Ves. 159, 161.

(*h*) 1 Sim. & St. 610.

Ch. XVIII.

mutuality of remedy, vendor who only wants his purchase-money may sue in Equity.

being accepted and there being nothing special in the case, wants nothing but his purchase-money and interest, which an action at Law would give him : it appears, however, to be settled that, upon the principle of affording mutual remedies, the Courts will entertain such a suit (*i*) ; whether the consideration be a life annuity, or a gross sum (*k*).

Whether the existence of an easier remedy by mandamus is a bar.

Plaintiff cannot proceed at once at Law and in Equity.

Whether the mere fact of the defendant being bound under an Act of Parliament to complete the contract, and of the plaintiff having an easier remedy by Mandamus, will prevent the latter from resorting, (if he please,) to a Court of Equity, seems to be doubtful (*l*) : if, however, a plaintiff proceed both at Law and in Equity for the same subject-matter, he may, by order of course, be compelled to elect between his action and suit (*m*) : and this relief has been afforded where a landlord had filed a bill against his tenant for specific performance of an agreement to take a lease, and was also suing him for use and occupation of the premises during part of the term (*n*) : but where the action is brought for the non-performance of particular acts :—*e. g.*, to improve or repair the property—the performance of which is not specifically prayed by the bill, or which are acts the specific performance of which cannot be decreed, and the action is brought only for such damages as were sustained up to the time of its commencement, no case for election seems to arise (*o*).

Specific performance

And although the agreement may in itself vest in the

(*i*) *Withy v. Cottle*, 1 Sim. & St. 174 ; *Adderley v. Dixon*, *ib.* 607 ; *Clifford v. Turrell*, 1 Y. & C. C. C. 138 ; see V. C. Wigram's judgment in *Adams v. Blackwall Railway Company*, 13 Jur. 621.

(*k*) *Clifford v. Turrell*, *ubi supra* ; affirmed, 9 Jur. 633.

(*l*) See *Walker v. Eastern Counties Railway Company*, 6 Ha. 594 ;

Adams v. Blackwall Railway Company, 13 Jur. 620, V. C. Wigram, reversed on appeal, 2 Mac. & G. 118 ; see also *Hyde v. Edwards*, 13 Jur. 757, R.

(*m*) Danl. Ch. P. by H. 791, 793 ; *Royle v. Wynne*, Cr. & Ph. 252.

(*n*) *Ambrose v. Nott*, 2 Ha. 649.

(*o*) See *Fennings v. Humphery*, 4 Beav. 1, 7.

purchaser the interest contracted for (*p*), yet, if it appear on its face that a further instrument is necessary to carry out the intentions of the parties, the Court will decree specific performance of the agreement in that particular (*q*).

Ch. XVIII.

when decreed, although contract may vest estate in purchaser.

(2.) *By whom specific performance will be enforced.*

Equity will enforce specific performance of the contract for sale at the suit of the purchaser himself, or of his representatives in interest,—such interest, it must be remembered, being the right to take the estate on payment of the purchase-money;—*e. g.*, his alienees by act *inter vivos* (*r*), or assignees in bankruptcy (*s*), or committees in lunacy (*t*), or, in case of his death, by his real or personal representatives, (according to the nature of the estate contracted for).

Enforced in Equity at suit of purchaser, or his representatives in interest;

So, the contract for purchase will be enforced at the suit of the vendor himself, or his representatives in interest;—such interest, it must be remembered, being the right to receive the purchase-money on a conveyance being given of the estate;—*e. g.*, his alienees by act *inter vivos* (*u*), or assignees in bankruptcy (*w*), or committees in lunacy (*x*), or, (in the case of death,) by his executors or administrators (*y*): so, if the contract have been entered into by a tenant for life, in due (*z*) exercise of a power, specific performance will, it is conceived, be decreed at the suit of a remainderman (*a*).

or of vendor, or his representatives in interest.

(*p*) *Sed vide supra*, 115.

(*w*) See 12 & 13 Vict. c. 106, ss.

(*q*) *Fenner v. Hepburn*, 2 Y. & C.

141, 142.

C. C. 159.

(*x*) Shelf. on Lun. 564.

(*r*) See *Nelthorpe v. Holgate*, 1

(*y*) *Roberts v. Marchant*, 1 Phil.

Coll. 218.

370.

(*s*) See 6 Geo. IV. c. 16, s. 76;

(*z*) But not otherwise, *Ricketts v.*

12 & 13 Vict. c. 106, s. 146.

Bell, 1 De G. & S. 335.

(*t*) See Shelf. on Lun. 546, *et seq.*

(*a*) See *Shannon v. Bradstreet*, 1

(*u*) See *Calv. on Par.*, 2nd ed. 314;

Sch. & Lef. 52, 65; *Lowe v. Swift*, 2

Dan. Ch. Pr. by H., 206.

Ball & B. 529; 2 Sug. Pow. 6th ed.

p. 134; 1 De G. & S. 344.

Ch. XVIII.

(3.) *Against whom specific performance will be enforced.*

Enforced
against
vendor, and
parties
claiming
under him
by subse-
quent title,
(except
purchasers
without no-
tice);

and against
parties
claiming
under a
prior title,
which he
might have
displaced by
conveyance.

Equity will enforce specific performance of the contract for sale, against the vendor himself, and also against, first, persons claiming under him by a title arising subsequently to the contract; (except purchasers for valuable consideration who have paid their money and taken a conveyance without notice of the original contract): *e. g.*, his assignees in bankruptcy (*b*), or committees in lunacy (*c*), or voluntary alienees (*d*), or judgment creditors (*e*), or the after-taken wife or husband of the vendor (*f*), or the vendor's alienees for value, (if they purchased with notice of the prior contract (*g*), or have not taken a conveyance (*h*),) or, (in case of his death,) against his real or personal representatives, (according to the nature of the estate contracted for): and secondly, persons claiming under a title which, although prior to the contract and known to the purchaser, might have been displaced by a conveyance by the vendor: *e. g.*, voluntary alienees (*i*); wife entitled to freebench, (if, as is the case in most manors, her title depends upon her husband dying seised) (*k*); dowress who married since the late Dower Act came into operation (*l*); and remaindermen, or *cestuis que trust*, in cases where the

(*b*) *Orlebar v. Fletcher*, 1 P. Wms. 737; *Taylor v. Wheeler*, 2 Ver. 564; and see 2 Ves. sen. 633; *Parker v. Smith*, 1 Coll. 608.

(*c*) Shelf. on Lun. 564; 1 Will. IV. c. 65, s. 27.

(*d*) See *Hinton v. Hinton*, 2 Ves. sen. 631, 633.

(*e*) *Brunton v. Neale*, 14 L. J., N. S., L. C. 8.

(*f*) See 2 Ves. sen. 633.

(*g*) *Daniels v. Davison*, 16 Ves. 249; *Lightfoot v. Heron*, 3 You. & C. 586; *Cutts v. Thodey*, 1 Coll. 223; *Potter*

v. Sanders, 6 Ha. 1.

(*h*) As to which, *vide supra*, 392.

(*i*) *Buckle v. Mitchell*, 18 Ves. 100; *Metcalfe v. Pulvertoft*, 1 Ves. & B. 180; *Willats v. Busby*, 5 Beav. 193: but the voluntary settlor, if he contract to sell the estate, cannot himself enforce specific performance; *Smith v. Garland*, 2 Mer. 123; *Johnson v. Legard*, Turn. & R. 281.

(*k*) *Hinton v. Hinton*, 2 Ves. sen. 631; *Brown v. Raindle*, 3 Ves. 256.

(*l*) 3 & 4 Will. IV. c. 105, ss. 4 & 5.

vendor has contracted in due exercise of a power or pursuant to a trust (*m*) : subject, nevertheless, to these exceptions ; viz., that the contract of a tenant in tail who dies before executing the conveyance, does not affect the interests of the issue in tail or remaindermen (*n*) ; and that the contract of a trustee will not be enforced if the attendant circumstances constituted it a breach of trust (*o*).

The contract by a married woman, either with or without her husband's concurrence, for the sale of her real estate not settled to her separate use or appointment, (other than her chattels real,) (*p*) is incapable of being enforced against her (*q*) : nor will it, although signed with the husband's concurrence and in his presence, bind any interest which he may then unknowingly have, or subsequently acquire, in the property (*r*) : if, having a power of appointment, she enter into a contract executed with the formalities required by the power (*s*), or if, as respects estate settled merely to her separate use with no restraint on anticipation, she enter into such a contract as would bind her if a *feme sole* (*t*), the estate, it is conceived, in either case is bound, although no decree can be made against her personally (*u*) : and even in the case of an agreement in exercise of a power, the want of mere formalities, may, it seems, be supplied ; *e. g.*, where a married woman having a power to appoint by deed enters into a

Contract for sale of married woman's estate, when capable of being enforced.

(*m*) *Mortlock v. Buller*, 10 Ves. 315 ; *Dowell v. Dew*, 1 Y. & C. C. 345 ; and see cases cited, *supra*, 461, n. (*a*).

(*n*) 3 & 4 Will. IV. c. 74, s. 47 ; and see, as to the same being the rule before the Act, *Frank v. Mainwaring*, 2 Beav. 115 ; Sug. 227.

(*o*) *Mortlock v. Buller*, 10 Ves. 292 ; *White v. Cuddon*, 8 Cl. & Fin. 766.

(*p*) As to which see next paragraph.

(*q*) *Emery v. Wase*, 5 Ves. 846 ; *Davidson v. Gardner*, Sug. 230 ; *Aylett v. Ashton*, 1 Myl. & Cr. 105 ; see *Lassence v. Tierney*, 1 Mac. & G. 572.

(*r*) *Aylett v. Ashton*, 1 Myl. & Cr. 105.

(*s*) See Sug. 230, n. (*p*) ; *Martin v. Mitchell*, 2 Jac. & W. 425.

(*t*) *Stead v. Nelson*, 2 Beav. 245.

(*u*) *Nantes v. Corrock*, 9 Ves. 189 ; *Aylett v. Ashton*, 1 Myl. & Cr. 112 ; *Francis v. Wigzell*, 1 Madd. 258.

Ch. XVIII. contract not under seal, specific performance may be decreed (*w*) ; but this, it is conceived, would not be the case where the omission went to the substance of the power, or consisted in the want of formalities which were intended for her protection (*x*).

Whether wife surviving is barred by husband's contract for sale of her chattels real.

It does not appear to be settled (*y*), whether the husband's contract to sell the term for years, (whether legal or equitable,) of his wife, would bind her surviving : some early authorities are in favour of the purchaser (*z*) ; but, in recent decisions, so strong an inclination has been shown to limit the husband and his alienees to their strict legal rights, that it may be reasonably conjectured that the wife surviving would not be bound (*a*).

Whether she may adopt his contract.

In one case (*b*) a question arose, but was not decided, as to whether the wife surviving may *adopt* her husband's contract for sale of her real estate.

Vendor's contract cannot be enforced against parties claiming under prior absolute title.

And the vendor's contract will, of course, not be enforced against persons claiming under a prior title which he himself could not have displaced by a conveyance ; *e. g.*, a dowress under the old law, or a wife seised of an estate of inheritance ; nor will the contract of a tenant for life be enforced against the trustees of the reversion who are empowered but decline to sell at his request (*c*).

Purchaser's contract will be enforced against him-

So, the contract for purchase will be enforced against the purchaser himself, his committees in lunacy (*d*), and

(*w*) See *Stead v. Nelson*, *ubi supra* ; *Dowell v. Dew*, 1 Y. & C. C. C. 345.

(*x*) See *Lassence v. Tierney*, 1 Mac. & G. 551, 572.

(*y*) See the query of V. C. K. Bruce, in *Clark v. Burgh*, 2 Coll. 226.

(*z*) See *Stead v. Cragh*, 2 Eq. Ca. Ab. 37, 130 ; and Lord Eldon's remarks in *Druce v. Denison*, 6 Ves. 394.

(*a*) See *Sturgis v. Champneys*, 5 Myl. & Cr. 97 ; *Ehcy v. Williams*, 7 Jur. 337 ; *Ashby v. Ashby*, 1 Coll. 553 ; *Newenham v. Pemberton*, 1 De G. & S. 644 ; *Whittle v. Henning*, 2 Ph. 731.

(*b*) *Humphreys v. Hollis*, Jac. 76.

(*c*) *Thomas v. Dering*, 1 Keen, 729.

(*d*) Shelford on Lunacy, 564 Sug. 233.

real and personal representatives. If he become bankrupt, his assignees have the option of abandoning the contract or of completing it, (paying, of course, the entire amount due for purchase-money,) and the vendor may, by application to the Court, compel them to make their election (*e*). It is however conceived, that if, (as might sometimes happen, *e. g.*, in the case of house property destroyed by fire after the contract,) the vendor were willing to convey the estate and to prove under the bankruptcy for the purchase-money, he would have a right to do so. Where the purchaser, having paid part of the purchase-money, becomes insolvent, and his assignees, upon a bill being filed against them, disclaim, the Court will declare the representatives of the vendor absolutely entitled to the estate (*f*).

Ch. XVIII.
self and his
representa-
tives.

A married woman's separate estate may be liable under her contract for purchase; but the vendor's suit must be directed specifically against such separate estate, and should not seek a decree against her personally (*g*).

Against
separate
estate of
married
woman.

(4.) *As to the parties to the suit.*

In general, it is only necessary to make those persons parties to a suit for specific performance who were parties to the contract (*h*): for instance, a purchaser cannot join as co-defendants the receivers or stewards of the owners of the estate, although they are in that capacity possessed of the title deeds delivery of which is sought by the suit (*i*); nor, it would seem, the wife of the vendor who has possessed herself of the deeds (*k*); nor a mortgagor, whose

Parties to
contract are,
in general,
alone neces-
sary parties
to the suit.

Purchaser
cannot join
as co-de-
fendant,
receiver, or
steward.

Or parties
claiming

(*e*) 12 & 13 Vict. c. 106, s. 146.

(*f*) *Gabriel v. Sturgis*, 5 Ha. 97.

(*g*) *Francis v. Wigzell*, 1 Madd. 258; and see *Owens v. Dickenson*, Cr. & Ph. 48; *Muston v. Bradshaw*, 10 Jur. 402, V. C. E.; 15 Sim. 192; *Gaston v. Frankum*, 13 Jur. 739.

(*h*) *Humphreys v. Hollis*, Jac. 75;

Wood v. White, 4 Myl. & Cr. 460.

(*i*) *M'Namara v. Williams*, 6 Ves. 143.

(*k*) *Muston v. Bradshaw*, 10 Jur. 402, V. C. E.; 15 Sim. 192.

Ch. XVIII.

adverse interests prior to the contract.

Person interested in contract, and bound to join in conveyance, not a necessary party to vendor's bill.

Persons having adverse, inconsistent, or no rights, cannot join the vendor as co-plaintiffs;

mortgagee, or mortgagee's trustee, has entered into the contract under a mortgage power of or trust for sale (*l*) ; nor, upon a sale by a mortgagor, the mortgagee, nor any person interested in the equity of redemption (*m*) ; nor a person who has joined the vendor in the sale in respect of other property, under conditions, as to laying out roads, &c., affecting the whole estate (*n*) ; nor, as a general rule, any person upon the ground of his claiming any adverse interest which was vested in him prior to the contract (*o*).

Nor need a stranger to a contract be made a party to a suit on the ground of his being interested in the contract, or bound to concur in the conveyance ; as where, on the sale in two lots of leaseholds held under an entire rent, it was stipulated that the purchaser of each lot should be a party to the assignment of the other lot, for the purpose of entering into the covenants by way of indemnity usual in such cases, it was held, that the purchaser of lot 2 was not a necessary party to the vendor's bill for specific performance of the purchase of lot 1 (*p*) : so, where a landowner agreed to sell land to a Railway Company, and to buy up his tenant's interest, it was held that the tenant was not a necessary party to the vendor's bill for specific performance and to restrain trespass by the Company (*q*).

Persons having rights adverse to or inconsistent with those of the vendor, or having no rights in the subject-matter of the suit, ought not to be joined with him as co-plaintiffs (*r*) : and if, being infants, they were so joined in respect of adverse or inconsistent rights, the Court would

(*l*) *Clay v. Sharpe*, 18 Ves. 346, n. ; *Corder v. Morgan*, *ib.* 344.

(*m*) *Tasker v. Small*, 3 Myl. & Cr. 63.

(*n*) *Peacock v. Penon*, 11 Beav. ; see p. 359.

(*o*) *Delabere v. Norwood*, 3 Sw. 144 ; *Petre v. Duncombe*, 7 Ha. 24 ;

Sug. 252 ; but see a case of *Collett v. Hoover*, 1 Coll. 227.

(*p*) *Paterson v. Long*, 5 Beav. 186.

(*q*) *Robertson v. Great Western Railway Company*, 10 Sim. 314, C.

(*r*) See *Fulham v. M'Carthy*, 1 H. L. C. 703 ; *Padwick v. Platt*, 11 Beav. 503.

refuse to make a decree, even by consent (*s*): nor can parties claiming such rights be made defendants to the purchaser's bill (*t*): but they may, it would appear, (and this seems to form an exception from the above general rule,) be made defendants to the vendor's bill (*v*).

Ch. XVIII.

but may be made defendants (*semble*).

However, where, at a sale by auction, it was arranged that a portion of lot A. should be sold as part of lot B., it was, on a bill being filed by the purchaser of lot A. for specific performance according to the particulars, held, that the purchasers of lot B. were necessary parties; upon the special ground, that the vendor ought not to remain exposed to another suit by the purchaser of lot B. for specific performance according to the arrangement at the sale (*w*).

Purchaser of one lot, when a necessary party to suit in respect of another lot.

If the contract were entered into by an agent, and were under seal, the other party may insist upon the agent being included in any suit for specific performance by the principal: inasmuch as the performance of the covenant with the principal would be no defence to an action at law by the agent (*x*).

Agent must be a party if contract under seal.

Generally, however, the contract is not under seal; but, even then, if the agency be not apparent on the contract, the nominal contractor should, (unless the plaintiff can prove the agency,) be made a party to the suit, as a defendant (*y*), in order to bind his apparent interest (*z*); and, although an action at Law might in such a case be

When to be made a party, if contract not under seal.

(*s*) See *Wood v. White*, 4 Myl. & Cr. 483.

(*t*) *Tasker v. Small*, 3 Myl. & Cr. 63.

(*v*) See Calvert on Parties, 329; *Evans v. Jackson*, 8 Sim. 217; *Sanders v. Richards*, 2 Coll. 568; and see Lord Langdale's remark as to the judgment creditors, in *Lord Leigh v. Lord Ashburton*, 11 Beav. 474.

(*w*) *Mason v. Franklin*, 1 Y. & C. C. C. 239.

(*x*) See *Cooke v. Cooke*, 2 Vern. 36; *Cope v. Parry*, 2 Jac. & W. 538.

(*y*) See and consider *Fulham v. M'Carthy*, 1 H. L. C. 703.

(*z*) 1 Dan. Ch. P. by H. 205; *Taylor v. Salmon*, 4 Myl. & Cr. 134; and see *Nelthorpe v. Holgate*, 1 Coll. 217, 218; where it was held that an agent might join as co-plaintiff.

Ch. XVIII.

Auctioneer,
when and
why made a
party.

Agent, when
an improper
party.

Death of
vendor—
who then
entitled to
sue pur-
chaser, and
who are pro-
per parties
to suit.

Heir, when
an unneces-
sary party.

maintained by either agent or principal, if a bill be filed, the parties beneficially interested in the contract must be parties to the suit (*a*). So, an auctioneer is frequently made a co-plaintiff with the vendor, upon the ground either of his having an interest in the contract, or of his liability to an action for the deposit (*b*). But, if the agent has no interest in the contract or the subject-matter thereof, and is under no liability in respect of the contract, he is an improper party to the suit (*c*).

If the vendor die before completion, his personal representatives, as being entitled to the purchase-money, are *primâ facie* the proper plaintiffs: if the personal estate has been vested in trustees under an order of the Court, and a bill is filed by such trustees, the personal representative is still a necessary party (*d*); and unless the plaintiffs have power to convey the vendor's interest in the estate (*e*), the person in whom the same is vested, or who has power to convey it, must also be made a party (*f*): but if there are devisees, or if the executors are empowered to sell, the heir is said to be an unnecessary party (*g*), as the purchaser has no right to insist on proof of the will against the heir (*h*): however, in a recent case, although special circumstances, tending to impeach the validity of the will, were held to entitle the purchaser to this protection, it does not appear to have been considered that the heir should have been made a party; but the cause stood over

(*a*) *Small v. Attwood*, 1 Younge, 457; the words "suit" and "contract" in lines 10 and 11, should evidently be transposed.

(*b*) See Dan. Ch. P. by H. 205, 207.

(*c*) *King of Spain v. Machado*, 4 Russ. 225, 240; *Kingsley v. Young*, cited Daniell's Ch. P. by H. 207.

(*d*) See *Cave v. Cork*, 2 Y. & C. C. C. 130, 133.

(*e*) *I. e.*, the estate, whether legal or merely equitable, which the vendor held subject to the contract; see *Roberts v. Marchant*, 1 Ha. 547.

(*f*) *Roberts v. Marchant*, 1 Ha. 547.

(*g*) See Calvert on Parties, 327.

(*h*) *Colton v. Wilson*, 3 P. Wms. 192; *Bellamy v. Liversidge*, Sug. 464; and see *Morrison v. Arnold*, 19 Ves. 673.

that the vendor might file a bill against him to establish the will (*i*). If the vendor have devised the estate in strict settlement, the trustees, the persons (if any) in whom the first estate of inheritance is vested (*k*), and the intermediate tenants for life (*l*), and the owners (if ascertained) of any intermediate contingent or executory estates (*m*), must be made parties.

So, the personal representatives of the vendor, and the persons who have power to convey his estate, are the proper parties to a purchaser's bill (*n*).

So, if the vendor have, by act *inter vivos*, assigned his interest under the contract, he, or, if he be dead, his personal representative, must be a party to the assignee's bill as defendant; or, if such interest be recoverable *at Law*, either as defendant or as co-plaintiff (*o*); so, if subsequently to the contract the vendor have aliened or incumbered the estate contracted for, the weight of authority seems to show that the alienees or incumbrancees, if they took with notice of the contract, may be made defendants to the purchaser's bill (*p*).

When the estate is vested in trustees in trust to sell and pay the proceeds to specified persons with power to give receipts, the *cestuis que trust* are not necessary parties to the suit (*q*).

If the purchaser die before completion, his heir or de-

Ch. XVIII.

Who, in such case, are proper parties to purchaser's bill.

Alienation of vendor's interest by act *inter vivos*—who are proper parties to suit either against or by purchaser.

Cestuis que trust, when unnecessary parties.

Death of purchaser—

(*i*) *Grove v. Bastard*, 2 Phill. 619; the heir appears to have been made a defendant in *Colton v. Wilson*, 3 P. Wms. 192.

(*k*) *Hopkins v. Hopkins*, 1 Atk. 590.

(*l*) *Gore v. Staupoole*, 1 Dow. 18, 31.

(*m*) Dan. Ch. P. by H. 263.

(*n*) See Calv. on Part. 327.

(*o*) See *Fulham v. McCarthy*, 1 H. L. C. 703, 722; Dan. Ch. P. by H. 208; *Ryan v. Anderson*, 3 Madd.

174; and see 5 Ha. 554; *Padwick v. Platt*, 11 Beav. 503.

(*p*) See *Daniels v. Davison*, 16 Ves. 249; *Echcliff v. Baldwin*, *ib.* 267; *Spence v. Hogg*, 1 Coll. 225; *Collett v. Hover*, *ib.* 227; *Potter v. Sanders*, 6 Ha. 1; Dan. Ch. P. by H. 233; but see *contra*, *Cutts v. Thodey*, 1 Coll. 223; Calv. on Part. 325.

(*q*) *Wakeman v. Duchess of Rutland*, 3 Ves. 233; *Binks v. Lord Rokeby*, 2 Madd. 227.

Ch. XVIII.

who are entitled to sue vendor, and who are proper parties to suit.

Or to suit by vendor.

Alienation of purchaser's interest by act *inter vivos*—who are proper parties to suit, by or against vendor.

Purchaser not to be a party if his assignee has been accepted by vendor.

visee, (if the estate be one of inheritance,) is the party entitled to sue for specific performance, making the personal representatives parties, if he seek payment of the purchase-money out of the personal estate (*r*); so, on a bill filed by the vendor, the heir or devisee of the purchaser is a necessary party to the suit (*s*); so, if the bill be filed against the heir or devisee of the purchaser, the personal representatives must be made parties, because the purchase-money is primarily payable out of the personal estate (*t*).

If the purchaser have assigned the benefit of the contract, the suit against the vendor for specific performance should, it would seem, be by the assignee (*v*); making the purchaser a defendant: if, however, the purchaser merely enter into an ordinary agreement for a sub-purchase, agreeing himself to convey the estate, and not that the original vendor shall convey it, such sub-purchaser is not a necessary party to a suit for the performance of the original contract (*w*).

And where the purchaser's assignee has been accepted in his place by the vendor, the original purchaser should not be made a party to the vendor's suit (*x*).

(5.) *As to the Bill.*

Suit may now be commenced by bill or claim.

A suit for specific performance may now be commenced by Bill or by Claim under the orders of 22nd April 1850; these orders (*y*) are not compulsory, but their practical

(*r*) *Broome v. Monck*, 10 Ves. 597; *Buckmaster v. Harrop*, 13 Ves. 456; *vide supra*, 125, 126 and n. (*s*), *ibid*.

(*s*) *Townsend v. Champernowne*, 9 Pri. 130.

(*t*) Dan. Ch. Pr. by H. 278.

(*v*) See *Fulham v. McCarthy*, 1 H. L. C. 703, 717; *Padwick v. Platt*, 11 Beav. 503; but see *Nel-*

thorpe v. Holgate, 1 Col. 203; *Moxhay v. Inderwick*, 11 Jur. 837.

(*w*) See *Anon. v. Walford*, 4 Russ. 372.

(*x*) *Holden v. Hayn*, 1 Mer. 47; *Hall v. Laver*, 3 Y. & C. 191; see *Hemingway v. Fernandes*, 13 Sim. 228.

(*y*) The effect of which is stated *infra*, p. 473, *et seq*.

effect will, probably, be, to supersede to a considerable extent the old form of proceeding; they do not however seem to be in their present form adapted to cases involving complicated and disputed matters of fact.

Assuming that the suit be commenced by Bill;—if the bill state that the agreement was in writing, it need not allege signature (*z*): nor that it was duly stamped (*a*); nor is it clearly necessary to allege that the agreement was in writing, (supposing such to be the fact) (*b*); although either the writing and signature, or special circumstances taking the case out of the Statute of Frauds, must be proved at the hearing.

Where letters are relied upon, they may be stated in the bill, either as constituting the agreement, or as evidence of a parol agreement; in the latter case, it will be necessary to prove other matter sufficient to take the case out of the statute (*c*).

As a general rule, the bill need not state inferences or results of law arising from the facts alleged: it has, however, been held by V. C. *K. Bruce* in two recent cases, that where the vendor means to rely on the purchaser's waiver of his *primâ facie* right to a marketable title, he must allege or charge such waiver; and that it is not sufficient to allege facts which, if proved, would be evidence of waiver (*d*): but, on the other hand, it is improper to introduce general charges or averments of waiver, &c., unsupported by a statement of the particular facts; the

As to the form of the bill.

It need not allege signature of agreement, or writing, *semble*.

Letters, how to be referred to.

Inferences of law, whether to be stated.

Waiver relied on should be alleged;

and facts supporting

(*z*) *Rist v. Hobson*, 1 S. & S. v. *Wilkes*, 3 Bro. C. C. 400.

543; *Field v. Hutchinson*, 1 Beav. 599. (c) See *Birce v. Bletchley*, 6 Madd. 17; *Skinner v. M'Douall*, 2 De G. & S. 265.

(a) 1 Dan. Ch. Pr. by H. 347.

(b) See *Spurrier v. Fitzgerald*, 6 Ves. 548; 1 S. & S. 543; 1 Dan. Ch. Pr. by H. 347; but see *Redding* (d) *Clive v. Beaumont*, 1 De G. & S. 397; and *Gaston v. Frankum*, 13 Jur. 739, V. C. K. B.

Ch. XVIII.

it should be stated.

Prayer for general relief, what relief can be obtained under.

party ought so to frame his case upon the record, that the Court can fairly see what the case is which is to be relied on (*e*).

The plaintiff cannot, under the prayer for general relief, obtain a decree inconsistent with either the specific case made, or the specific relief prayed by the bill (*f*): for instance, a vendor who, through want of title, fails to obtain a decree for specific performance against a purchaser in possession, cannot, under the prayer for general relief, obtain an account of the rents and profits; although the defendant by his answer state his readiness to pay a fair rent (*g*): nor, where he fails in proving the agreement alleged by his bill, can he, in general, take a decree for performance of a different agreement admitted by the defendant's answer (*h*): nor can he, under the general prayer, obtain relief which, although consistent with the specific relief, is yet sustained only by allegations which have been introduced merely as showing his right to the specific relief (*i*): and, in general, where a bill is filed making a case of actual fraud, and such fraud is disproved or not established, the Court will not allow the bill to be used for any secondary purpose, but will dismiss it with costs (*k*).

(*e*) See *Hunter v. Daniel*, 4 Ha. 432.

(*f*) See authorities cited in the four next notes, and see *Hiern v. Mill*, 13 Ves. 119; *Cockerell v. Dickens*, 1 Mon. D. & De G. 45, 81, Priv. C.

(*g*) *Williams v. Shaw*, 3 Russ. 178, n.

(*h*) *Legal v. Miller*, 2 Ves. sen.

299; but see *Mortimer v. Orchard*, 2 Ves. jun. 243; and *Hanbury v. Litchfield*, 2 Myl. & K. 629; in which, under special circumstances, the plaintiff obtained a decree.

(*i*) *Stevens v. Guppy*, 3 Russ. 171, 185.

(*k*) *Glascott v. Lang*, 2 Ph. 310, 322; and see *Wilde v. Gibson*, 1 H. L. C. 621.

(6.) *As to proceeding by Claim, under the Orders of April, 1850.*

Under the Orders of April, 1850, any person seeking equitable relief may, without special leave of the Court, and instead of proceeding by bill in the usual form, file a Claim in the Record and Writ Clerks' Office, in (among other specified cases,) any case where the plaintiff is, or claims to be, a person entitled to the specific performance of an agreement for the sale or purchase of any property, seeking such specific performance : such claim to be in the form, and to the effect, of the form No. 8 set forth in the Schedule A. to the said Orders; and the filing of such claim is to have the force and effect of filing a bill (*l*) : and in any case in which the above form is not applicable, the Court may, upon the *ex parte* application of the plaintiff, and upon reading the claim proposed to be filed, give leave to file it (*m*).

Proceedings
by claim,
under the
Orders of
April, 1850.

Special
claim.

Upon filing the claim the plaintiff may sue out a writ of summons to the defendant, requiring him to cause an appearance to be entered, and also requiring him, on a day or time to be therein named, or on the seal or motion day then next following, to show cause, if he can, why such relief as is claimed by the plaintiff should not be had ; or why such order as shall be just with reference to the claim should not be made (*n*) : the time named for showing cause is to be fourteen days at the least after service of the writ ; but, by consent of the parties, and with the leave of the Court, cause may be shown on any earlier day (*o*).

Writ of
summons.

The only person who need be named in the writ of Who to be

(*l*) See Orders 1 and 2.

(*m*) Order 6.

(*n*) See Orders 5, 6.

(*o*) Order 11.

Ch. XVIII.
named de-
fendant.

Showing
cause.

summons, as defendant to the suit in the first instance, is the person against whom relief is directly prayed (*p*).

At the time named in the writ for showing cause, or on the seal or motion day then next following, or so soon after as the case can be heard, the defendant, having previously appeared, is, personally or by counsel, to show cause in Court, if he can, (and, if necessary, by affidavit (*q*),) why such relief as is claimed by the claim should not be had against him (*r*).

Hearing
and order
thereon.

At the time appointed for showing cause, upon the motion of the plaintiff, and on hearing the claim, and what may be alleged on the part of the defendant, or upon reading a certificate of the appearance being entered by the defendant, or an affidavit of the writ of summons being duly served, the Court may, if it shall think fit, make an order granting or refusing the relief claimed, or directing any accounts or inquiries to be taken or made, or other proceedings to be had for the purpose of ascertaining the plaintiff's title to the relief claimed: and the Court may direct such (if any) persons or classes of persons as it shall think necessary or fit, to be summoned or ordered to appear as parties to the claim, or on any proceedings before the Master with reference to any accounts or inquiries directed to be taken or made, or otherwise (*s*).

Effect of
order.

Every order to be so made is to have the effect of, and may be enforced as, a decree or decretal order made in a suit commenced by bill, and duly prosecuted to a hearing, according to the previous course of the Court (*t*).

Court at
hearing may
direct bill to
be filed.

If, upon the application for any such order, or during any proceedings under any such order when made, it shall

(*p*) Order 8.

(*r*) Order 12.

(*q*) It is understood that, in practice, the plaintiff is allowed to file affidavits in reply.

(*s*) Order 13.

(*t*) Order 14.

appear to the Court that, for the purposes of justice Ch. XVIII.
between the parties, it is necessary or expedient that a
bill should be filed, the Court may direct or authorize such
bill to be filed, subject to such terms as to costs or other-
wise as may be thought proper (*u*).

The orders made for granting relief in the several cases Form
order.
to which the forms set forth in Schedule A. are applicable,
may, if the Court thinks fit, be in the form and to the
effect set forth in Schedule C. as applicable to the par-
ticular case, with such variations as circumstances may
require (*v*).

If any of the cases enumerated in Order I., involve, or Plaintiff
may, under
special cir-
cumstances,
proceed by
bill.
are attended by, such special circumstances affecting either
the estate or the personal conduct of the defendant, as to
require special relief, the plaintiff is at liberty to seek his
relief by bill, as if the orders had not been made (*w*).

If any suit, for any of the purposes to which the forms As to extra
costs occa-
sioned by
unnecessa-
rily proceed-
ing by bill
instead of
claim.
set forth in Schedule A. are applicable, shall be com-
menced by bill and prosecuted to a hearing in the usual
course, and, upon the hearing, it shall appear to the Court
that an order to the effect of the decree then made, or an
order equally beneficial to the plaintiff, might have been
obtained upon a proceeding by summons in the manner
authorized by the orders, the Court may order the in-
creased costs occasioned by proceeding by bill, beyond the
costs which would have been sustained in proceeding by
summons, to be paid by the plaintiff (*x*).

It has been decided (*y*), that the above orders do not In what
cases orders
apply.
extend to injunction suits : and the form of claim given in
Schedule A. seems adapted only to cases where the plain-
tiff relies on a written agreement, (the documents consti-

(*u*) Order 15.

(*x*) Order 32.

(*v*) Order 16.

(*y*) *Holden v. Chalcraft*, 14 Jur.

(*w*) Order 31 ; that is, without in- 846.
curring any special liability to costs.

Ch. XVIII.

tuting which, must, if not admitted, be produced and proved at the hearing). (*y*) And the 1st Order has been held not to include a claim for specific performance of an agreement to grant (*z*) or take (*a*) a lease; although it may be filed by special leave under the 6th Order; but a claim for specific performance of a contract for purchase against the executors and devisee of the purchaser, claiming specific performance and costs, and in default, an administration of the purchaser's personal estate for the benefit of the plaintiff and creditors generally, and that, if plaintiff should not thus be fully paid, he might be declared to have a lien on the estate, and that it might, if necessary, be sold, has been held not to require leave (*b*); nor is leave necessary where, the title having been accepted, the purchaser refuses, on some collateral ground, to complete (*c*). *V. C. K. Bruce* has evinced a disposition to put a wide construction upon the orders; but the prevalent opinion seems to be, that they are, in the present shape, adapted only to clear and simple cases (*d*).

(7.) *As to how the Plaintiff's case may be sustained in the absence of a written agreement:—fraud,—part performance:—admission by Defendant of parol agreement:—parol variation of written agreement.*

Written
agreement,
when dis-
pensed with,

on the
ground of
fraud.

Part per-
formance or

Although, in general, there must, in order to sustain a suit for specific performance, be a contract in writing within the Statute of Frauds, the Courts, in certain cases, decree specific performance of a parol agreement, upon the ground, 1st, of fraud having been the cause of the non-compliance with the requisitions of the Statute: 2ndly, of

(*y*) See *Scargill v. Hurry*, 14 Jur. 847; *Marshall v. Davies*, 14 Jur. 997, V. C. R.

(*z*) *Keeble v. Dennish*, 14 Jur. 847.

(*a*) *Scargill v. Hurry*, *ib.*

(*b*) *Nottingham v. Mould*, 16 L. T. 122, V. C. K. B.

(*c*) *Hemming v. Mayo*, 14 Jur. 847.

(*d*) See *Jackson v. Grant*, Times 23rd Nov. 1850, 41 L. O. 79, V. C. R.

the parol agreement having been in part performed, or 3rdly, of its existence being admitted by the defendant (*e*). Ch. XVIII.
defendant's admission.

1st. If by fraud the defendant has prevented a compliance with the requisitions of the statute, this will not avail him, but the plaintiff will be entitled to relief on proving the fraud and the parol contract (*f*). Fraud takes the case out of the Statute.

2ndly, As to acts of part performance sufficient to take a case out of the Statute of Frauds.—It is, in general, of the essence of such an act, that the Court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract (*g*) ; for instance, delivery of possession is a sufficient part performance on the part of the vendor to sustain his suit against the purchaser (*h*) ; and acceptance of possession is a sufficient part performance, on the part of the purchaser, to sustain his suit against the vendor (*i*) : the fact of the purchaser being, without liability to a charge of trespass, in possession of the vendor's land, is considered as showing unequivocally that some contract has taken place between the litigant parties (*j*) ; and the Court will then receive parol evidence of the terms of such contract. So, the retention of possession by a tenant after the determination of the original tenancy, may, under special circumstances, amount to part performance (*k*) : so, if a tenant in possession lay out money on the premises, upon the faith of the parol agreement (*l*), or, it is conceived, commit acts

(*e*) As to the distinction between agreements and declarations of trust, see *Dale v. Hamilton*, 2 Ph. 266, 275.

(*f*) See note to *Pym v. Blackburn*, 3 Ves. 38, and cases there collected.

(*g*) *Per V. C. Wigram*, in *Dale v. Hamilton*, 5 Ha. 381.

(*h*) *Pyke v. Williams*, 2 Vern. 455;

Buckmaster v. Harrop, 13 Ves. 456 ;

Reynolds v. Waring, You. 351, 353.

(*i*) *Clinan v. Cooke*, 1 Sch. & Lef. 41 ; *Gregory v. Mighell*, 18 Ves. 328 ; *Morphett v. Jones*, 1 Sw. 172.

(*j*) *Per V. C. Wigram*, 5 Ha. 381.

(*k*) *Dowell v. Dew*, 1 You. & C. C. C. 345.

(*l*) *Wills v. Stradling*, 3 Ves. 382 ;

Ch. XVIII.

which would, (if he were merely tenant,) subject him to the loss of his lease (*m*), or to proceedings on the part of the landlord (*n*) : so, it has been held, that the mere payment of additional rent entitles the tenant to an answer from the landlord as to the existence of an agreement for a renewed lease, although the Court intimated an opinion against the admissibility of parol evidence in opposition to the answer (*o*).

And when the parties have for many years acted upon the assumption that a contract existed, acts which might not in themselves, and irrespectively of the lapse of time, have been sufficient to take the case out of the Statute, have been held to have that effect (*p*).

What are
insufficient.

But there can be no part performance of an incomplete contract (*q*) : and an act which, though in truth done in performance of a contract, admits of explanation without supposing a contract, is not, in general, sufficient to take the case out of the Statute (*r*) : *e. g.*, delivery of the abstract, or giving directions for the conveyance, is insufficient (*s*) : so, also, is payment of a sum alleged to be purchase-money (*t*) ; or procuring, and paying a valuable consideration for, a release by a third party (*u*) ; or the mere retention of possession by a tenant after the determination of his tenancy but before notice to quit (*v*) ; or an ex-

Mundy v. Jolliffe, 5 Myl. & Cr. 167;

Sutherland v. Briggs, 1 Ha. 26.

(*m*) See and consider *Parker v. Smith*, 1 Coll. 608.

(*n*) See 5 Myl. & Cr. 177; and *Sutherland v. Briggs*, *ubi supra*.

(*o*) *Wills v. Stradling*, 3 Ves. 378, 382.

(*p*) *Blackford v. Kirkpatrick*, 6 Beav. 232.

(*q*) *Lady Thynne v. Earl Glengall*, H. L. C. 131, 158; and see *Parker v. Smith*, 1 Coll. 623.

(*r*) 5 Ha. 381.

(*s*) Sug. 140; *Whaley v. Bagnet*, 1 Bro. P. C. 345; *Hole v. White*, 1 Bro. C. C. 409 (cited); *Thomas v. Blackman*, 1 Coll. 301.

(*t*) *Clinan v. Cooke*, 1 Sch. & Lef. 40; *Watt v. Evans*, 4 Y. & C. Ex. 579; and see 5 Ha. 381.

(*u*) *O'Reilly v. Thompson*, 2 Cox, 271.

(*v*) *Wills v. Stradling*, 3 Ves. 381; *Brennan v. Bollon*, 2 Dru. & War. 349.

penditure by the tenant to which he is liable under the terms of his lease (*w*) : so, possession obtained wrongfully by the plaintiff, of course, cannot avail him (*x*) : marriage, it may be remarked, is not, for the purposes of specific performance, considered as a part performance of a parol contract for which it forms the consideration (*y*).

So, if, in the case of moneys expended by a tenant, the circumstances were such as would, if there were no contract for sale, enable him to recover the amount from the landlord, the case would not appear to be different in principle from that of payment of purchase-money ; the same remark applies to the case of the payment of additional rent (*z*) ; where, however, as we have seen, the decision was, that the landlord who had pleaded the Statute should answer.

As to expenditure by tenant.

In the modern case of *Mundy v. Jolliffe* (*a*), the defendant, in pursuance of the parol agreement for a lease, had laid down a field in pasture, and executed draining and repairs ; acts which are referred to by Sir *J. Wigram* V. C. (*b*), as “certainly equivocal” : the bill was dismissed by Sir *L. Shadwell*, V. C., but this decision was reversed by Lord *Cottenham*, C., on appeal. His Lordship, in giving judgment, indicated a willingness rather to extend than to contract (*c*) the jurisdiction : “Courts of Equity,” observed his Lordship, “exercise their jurisdiction, in decreeing specific performance of verbal agreements, where there has been part performance, for the purpose of preventing the great injustice which would arise from permitting the party to escape from the engagements he has entered into, upon the ground of the Statute of Frauds, after the other

Mundy v. Jolliffe.

(*w*) *Frame v. Dawson*, 14 Ves. G. 572.
386.

(*x*) Sug. 141 ; *Hole v. White*, 1 Bro. C. C. 409, cited.

(*y*) *Dundas v. Dutens*, 1 Ves. jun. 199 ; *Lassence v. Tierney*, 1 Mac. &

(*z*) *Wills v. Stradling*, 3 Ves. 378.

(*a*) 9 Sim. 413 ; on appeal, 5 Myl. & Cr. 167.

(*b*) 5 Ha. 381.

(*c*) See Sug. 150.

Ch. XVIII.

party to the contract has, upon the faith of such engagement, expended his money or otherwise acted in execution of the agreement. Under such circumstances, the Court will struggle to prevent such injustice from being effected; and with that object, it has, at the hearing, when the plaintiff has failed to establish the precise terms of the agreement, endeavoured to collect what the terms of it really were" (*d*).

Verbal notice and retention of possession by tenant, held to be a sufficient declaration of option to purchase.

In a modern case, where an agreement in writing for a three years' tenancy reserved to the tenant the option of requiring a twenty-one years' lease at the expiration of the prior term, *V. C. Wigram* appears to have considered, that his verbal notice of intention to take the new lease, accompanied by retention of possession, was binding upon him (*e*).

Ejectment by landowner restrained on ground of mere acquiescence in heavy expenditure by party in possession, although no agreement.

In a late case, where a colliery proprietor, under the mistaken notion that he had a power of compulsorily purchasing land for the purpose of a railway, wrote to the landowner, and, referring to such supposed power, offered to purchase the land at a fair valuation, and, no reply being given, the railway was made over the land without further communication with him, but with his full knowledge; and then, after a fruitless negotiation as to the price to be given for the land, the landowner commenced an ejectment upwards of three years after the railway had been finished; the same learned judge on motion, restrained the action, upon the colliery proprietor giving judgment in the action, and paying into Court the utmost valuation of the land (*f*).

Plaintiff, how far

It seems to be clear, upon the modern authorities (*g*),

(*d*) 5 Myl. & Cr. 177.

(*e*) *Beatson v. Nicholson*, 6 Jur. 620.

(*f*) *Powell v. Thomas*, 6 Ha. 300.

(*g*) See *Allan v. Bower*, 3 Bro. C. C. 149; *Clinan v. Cooke*, 1 Sch. &

Lef. 38; *Boardman v. Mostyn*, 6 Ves. 467, 471; *Morphett v. Jones*, 1 Sw. 172; *Price v. Assheton*, 1 Y. & C. Ex. 82; *Dale v. Hamilton*, 5 Ha. 381; *Mundy v. Jolliffe*, 5 Myl. & Cr. 167, 177; Sug. 147.

that the Court, being satisfied of the existence of an agreement, will if possible, ascertain the real terms: Sir *E. Sugden*, however, remarks, that “the prevailing opinion requires the party seeking the specific performance in such a case to show the distinct terms and nature of the contract” (*h*); and in a case in Ireland, a reference was refused at the hearing, on the ground that the party setting up the agreement had not produced evidence which, if uncontradicted, would be sufficient to establish its essential terms; the Court holding that a reference should be directed only in cases where the evidence is contradictory (*i*). But it has been held, that where the bill states, as part of the agreement, a stipulation which would operate against the plaintiff, and which created a liability to which he would, in the absence of agreement, have been liable,—(e. g., an agreement by an intended lessee to pay taxes and make necessary repairs (*k*),)—or which has been satisfied, and so rendered immaterial, so far as relates to anything remaining to be done (*l*), the failure to prove such statement is unimportant.

But if the final result of all the evidence which can be procured, is, to leave the material terms of the agreement doubtful, as where it remained uncertain whether the purchase-money did or did not include the timber, the Court, of course, can make no decree (*m*): the Court, however, will endeavour to put a reasonable interpretation upon vague expressions in an agreement (*n*).

(*h*) *Sug.* 150; see *Price v. Assheton*, 1 Y. & C., Ex. 441.

(*i*) *Savage v. Carroll*, 1 Ball & B. 283, 550, 551; this case, however, was not one between vendor and purchaser; but the validity of the contract was discussed upon the collateral question, whether the heir of a purchaser who had died before completion was entitled to have the purchase-money paid out of the personal

estate.

(*k*) *Gregory v. Mighell*, 18 Ves. 328.

(*l*) *Mundy v. Jolliffe*, 5 Myl. & Cr. 167, 176.

(*m*) *Reynolds v. Waring*, You. 346; in this case no reference appears to have been asked for by the plaintiff.

(*n*) *Sanderson v. Cockermouth Railway Company*, 11 Beav. 497.

Ch. XVIII.

bound to show precise terms of contract.

Immaterial terms of agreement, although stated in bill, need not be proved;

the material terms must ultimately be clearly shown.

Ch. XVIII.

Act by defendant, merely to his own prejudice, no part performance;

nor does part performance, as to one lot, affect another lot.

Sales by auction and in bankruptcy are within the statute.

Admission of agreement by defendant, and statute not insisted on.

And it appears that, as a general rule, the plaintiff cannot rely upon any act by the defendant which can merely tend to his own prejudice, and not affect the plaintiff; *e. g.*, payment of auction-duty by the purchaser (*o*); or the execution and registration by the vendor of the conveyance (*p*). Nor, in the case of a purchase of separate lots under separate parol contracts, does part performance as to one lot set up the agreement as to another lot (*q*).

We may here remark, that sales by auction (*r*), and in bankruptcy (*s*), are both within the Statute of Frauds.

3rd. Where the defendant, by his answer, admits the parol agreement as alleged in the bill, and does not claim the benefit of the Statute, Equity will decree specific performance against himself, or, if he die before decree, against his representatives (*t*); so if he admit a different agreement from that alleged in the bill, the plaintiff may amend his bill and take the benefit of the admission (*u*); but, in any case, if relying on the admission, he is bound by its terms, and cannot vary them by parol evidence (*w*): so, if the defendant, although admitting the agreement, insist upon the Statute, no decree can be made against him (*x*); but he cannot, after having admitted and submitted to perform the agreement, claim the benefit of the Statute by his answer to the amended bill (*y*): nor can he unite a

(*o*) *Buckmaster v. Harrop*, 13 Ves. 465; the particular case cannot again arise, the duty having, as is well known, been repealed.

(*p*) *Hawkins v. Holmes*, 1 P.Wms. 770.

(*q*) *Buckmaster v. Harrop*, 13 Ves. 456, 474.

(*r*) *S. C.*; *Blagden v. Bradbear*, 12 Ves. 466.

(*s*) *Ex parte Cutts*, 3 Dea. 267, Lord Cottenham.

(*t*) See *Att.-Gen. v. Day*, 1 Ves. 221; Sug. 150; see *Parker v. Smith*, 1 Coll. 615.

(*u*) *Lindsay v. Lynch*, 2 Sch. & Lef. 9.

(*w*) *Pym v. Blackburn*, 3 Ves. 34.

(*x*) *Blagden v. Bradbear*, 12 Ves. 466; see *Moore v. Edwards*, 4 Ves. 23; *Cooth v. Jackson*, 6 Ves. 37; *Rowe v. Teed*, 15 Ves. 375.

(*y*) *Spurrier v. Fitzgerald*, 6 Ves. 548.

plea of the statute with any other defence by answer (*z*): in a late case, it appears to have been held by V. C. K. Bruce, that the defendant, denying the agreement, but omitting to claim the benefit of the statute by his answer, was not entitled to avail himself of it (*a*).

The plaintiff, as a general rule, if suing on a written contract is bound by its terms, and cannot, upon the ground of fraud, surprise, or mistake, seek to vary, add to, or explain its contents (*b*): except, perhaps, where the fraud consists in a refusal to accede to a promised variation upon the faith of which the plaintiff entered into a written agreement (*c*); or in a fraudulent preparation or alteration of the agreement so as to make it inconsistent with the real intention of the parties, and with the understanding of the plaintiff at the time he executed it; or where, by mistake, an agreement not expressing the real intention of the parties, is entered into, and the mistake is admitted by the answer, or, not being denied by the answer, is proved by unexceptionable evidence (*d*). A subsequent parol variation cannot be enforced by the plaintiff (*e*), unless there has been such a part performance of the varied agreement as would support a decree in the case of an original independent agreement (*f*); or,

Ch. XVIII.

Purchaser cannot, in general, enforce specific performance of a written contract with a parol variation.

A subsequent parol variation can only be enforced if part performed.

(*z*) *Cooth v. Jackson*, 6 Ves. 12.

(*a*) *Skinner v. M'Douall*, 2 De G. & S. 265.

(*b*) *Marquis of Townshend v. Stangroom*, 6 Ves. 328; *Cloves v. Higginson*, 1 Ves. & B. 524.

(*c*) *Pember v. Mathers*, 1 Bro. C. C. 52, 54; Sug. 188; but see *Clarke v. Grant*, 14 Ves. 519, 525, *et quære*.

(*d*) See note to *Pym v. Blackburn*, 3 Ves. 38, and cases as to fraud there cited; Lord Thurlow's judgment in *Lord Irnham v. Child*, 1 Bro. C. C.

94; Lord Eldon's remarks, 6 Ves. 339; Sir John Leach's argument, as counsel for the defendant, in *Wool-lam v. Hearn*, 7 Ves. 215; and the judgment in *Att.-Gen. v. Sitwell*, 1 You. & C. Exch. 583; as to admitting evidence in explanation of particular expressions, *vide supra*, p. 451, *et seq.*

(*e*) *Robson v. Collins*, 7 Ves. 130, 133.

(*f*) See *Van v. Corpe*, 3 Myl. & K. 269, 277; and Sug. 170.

Ch. XVIII. (it is conceived) unless the defendant by his answer admit the variation and do not insist on the Statute.

(8.) *As to grounds of defence negating plaintiff's right to specific performance except with a variation of the original written agreement; viz., fraud—mistake—misrepresentation—unfulfilled promise—parol variation, &c.*

On the other hand, it is quite competent for the defendant to set up a variation from the written contract; and it will depend on the particular circumstances of each case whether that is to defeat the plaintiff's title to have a specific performance, or whether the Court will perform the contract, taking care that the subject-matter of this parol agreement or understanding is also carried into effect; so that all parties may have the benefit of what they contracted for (g).

As to defences which negative plaintiff's right to specific performance except with a variation.

1st.—Fraud or mistake affecting the terms of the agreement.

The admissibility of parol evidence by way of defence to a bill for specific performance of a written agreement, in its literal unvaried terms, may be conveniently considered with reference to four classes of cases: viz.

1st. Cases where the defence is, that by fraud, or mistake, the written agreement is, *in terms*, different from that which the defendant supposed it to be, when he executed it; this, if proved, will negative the plaintiff's right to specific performance except with the variation (h).

2ndly.—
Fraud, mis-

2nd. Cases where the defence is, that by fraud, mistake, or surprise, the defendant executed the written agreement

(g) *Per Lord Cottenham, Cr & Ph. 62.*

(h) See *Joyes v. Statham*, 3 Atk. 388; *Woollam v. Hearn*, 7 Ves. 211; *Sug. 157*; *Marquis Townshend v. Stangroom*, 6 Ves. 328; *Ramsbottom v. Gosden*, 1 Ves. & B. 165; *Garrard*

v. Grinling, 2 Sw. 244; *Clinan v. Cooke*, 1 Sch. & L. 38, 39; *Humphries v. Horne*, 3 Ha. 277; but mistake, if relied on, must be clearly proved; *Clay v. Rufford*, 14 Jur. 803, V. C. W.; and see *Abranley v. Kinnaird*, 2 Mac. & G. 1.

under a reasonable misapprehension as to its effect as between himself and the plaintiff (*i*): here, also, the Court will refuse to make a decree according to the literal terms or strict construction of the agreement. Thus, where the terms of the agreement have been ambiguous, so that, adopting one construction, they may reasonably be supposed to have an effect which the defendant did not contemplate, the Court has, upon that ground only, refused to enforce it (*k*); and this, even where the defendant himself was the author of the ambiguity, and the plaintiff certainly supposed himself to be buying all he claimed (*l*); the principle is, that it is against conscience for a man to take advantage of the plain mistake of another; or, at least, that a Court of Equity will not assist him in doing so: but the mere existence of circumstances at the date of the contract which might easily have led to fraud, and the want of any professional adviser on the part of the defendant, have been held insufficient to negative the right to specific performance,—no fraud being shown (*m*).

Ch. XVIII.
take or surprise, inducing the defendant to enter into agreement misapprehending its effect;

but not mere suspicion of fraud.

3rd. Cases where the defendant has obtained the like protection, when he has executed the agreement, knowing its terms and understanding its effect, but relying upon some misrepresentation (*n*) by the plaintiff, or upon some

3rdly.—Misrepresentation, or unfulfilled promise, inducing defendant to enter into agreement know-

(*i*) But his mistake as to the use which he might make of it, is unimportant, see *Mildmay v. Hungerford*, 2 Vern. 243

(*k*) *Calverley v. Williams*, 1 Ves. jun. 210; *Higginson v. Clowes*, 15 Ves. 516; *Clowes v. Higginson*, 1 Ves. & B. 524; V. C. Wigram's judgment in *Manser v. Back*, 6 Ha. 447; and see *Atvanley v. Kinnaird*, 2 Mac. & G. 8. In *Jenkinson v. Pepys*, cited 6 Ves. 330, the evidence appears, in fact, to have been offered on behalf of the plaintiff instead of the defendant: see 6 Ha.

447.

(*l*) *Neap v. Abbott*, 1 C. P. Coop. 333; *Manser v. Back*, *ubi supra*. As to alteration of an agreement, *vide supra*, p. 108, and cases cited: see, also, a case of *Twentyman v. Barnes*, 12 Jur. 743, V. C. K. B., where a plaintiff alleged that the agreement had been altered by chemical agency, and moved that the paper might be subjected to chemical tests; but the Court refused the application.

(*m*) *Lightfoot v. Heron*, 3 Y. & C. 586.

(*n*) See *Buxton v. Lister*, 3 Atk.

Ch. XVIII.

ing its terms
and effect.

stipulation upon his part, which goes to vary the written agreement, but which he refuses to fulfil: *e. g.*, a parol promise to vary the terms of the written agreement has been admitted as a defence to a bill seeking its specific performance (*o*); and the same decision has been come to in the case of a parol promise by the auctioneer, on behalf of the vendor, to allow compensation for a deficiency in quantity; the right to which was in effect negated by the particulars (*p*).

Croome v.
Lediard.

However, where A. agreed to purchase Black Acre of B., and B. by the same instrument agreed to purchase White Acre of A., and no title could be shown to Black Acre, it was held that, in a suit by A. for specific performance of the agreement for the sale of White Acre, B. could not, as a defence, show that the performance of one agreement was intended to be conditional on the performance of the other; that the intention was to effect an exchange and not independent sales: Lord *Brougham*, C., in affirming the judgment of Sir *J. Leach*, observed, that “parol evidence of matter collateral to the agreement might be received, but no evidence of matter *dehors* was admissible to alter the terms and substance of the contract” (*q*): upon which Sir *E. Sugden* observes, that the evidence was inadmissible, “not because it was not to enforce a collateral stipulation, but because it did not prove that by fraud, mistake, or surprise, the agreement did not state the alleged real contract, viz. for an exchange between the parties” (*r*).

The meaning of the above extract from the judgment of

386; 7 Ves. 219; *supra*, Ch. III. p. 39, *et seq.*, and 62 *et seq.*

(*o*) *Clarke v. Grant*, 14 Ves. 519; *Micklethwait v. Nightingale*, 12 Jur. 638, R.

(*p*) *Winch v. Winchester*, 1 Ves. & B. 375, 378; and see Sir *E. Sug-*

den's remarks, p. 160, upon Sir Thomas Plumer's remarks in *Clowes v. Higginson*, 1 Ves. & B. 526.

(*q*) *Croome v. Lediard*, 2 Myl. & K. 251, see 260; and see *Lloyd v. Lloyd*, 2 Myl. & Cr. 192.

(*r*) *Sug.* 161.

the late Chancellor, is, perhaps, not very obvious; if meant to intimate that the non-fulfilment of a stipulation upon a point collateral to the written agreement, and not inconsistent with such agreement, nor shown to have formed any special inducement to its execution, is a good defence in Equity, the *dictum* seems of questionable authority; it having been held that the defendant cannot set up an additional parol stipulation, (*e. g.*, as to the time for delivery of possession,) which was agreed upon by the parties at the time of their signing the written contract (*s*).

Parol addition to written agreement, when inadmissible as a defence.

The distinction in principle between such cases would seem to be this; in the one case, the object of the defence is, not to invalidate or vary the written agreement, except so far as such effect may be incidentally produced by proving a parol agreement relating to the same subject-matter; and this is contrary to the Statute: in the other case, the object of the defence is, to directly attack the written agreement itself, by showing that it was executed under mistake, or on the faith of a misrepresentation by the other party, or of a promise made by him, and which, from his refusal to fulfil it, must be taken to have been originally fraudulent: and where the collateral parol agreement is inconsistent with the written contract, the conclusion would seem to be almost inevitable, that the latter was executed by the party favoured by the parol agreement, either under a mistake as to the contents of the written contract, or under a reliance on the good faith of the other party in performing the parol variation: and the fact of the point being provided for by the written contract, would seem to show, that the parties deemed it important; whereas the contrary may be reasonably presumed of a parol stipulation upon a point which is in no way provided for by the written contract.

Remarks upon the cases.

(*s*) *Omerod v. Hardman*, 5 Ves. 722, 730; and see Sug. 163, *et seq.*, and 187.

Ch. XVIII.

Stipulation
omitted by
consent, no
defence.

4th.—Sub-
sequent
parol varia-
tion, part
performed.

But where a stipulation is omitted from the written agreement, upon the supposition that it is illegal, the parties are bound by such omission (*t*).

4th. Cases where the written agreement is varied by parol subsequently to its execution: in which cases the variation, to be available as a defence, must be accompanied by such a part performance as would enable the Court to enforce it if it were an original independent agreement (*u*): subject nevertheless to the doctrine of Equity which allows parties, by their acts, to vary the original agreement in respect of matters relating to title and the time for completion (*w*).

(9.) *As to grounds of defence negating in toto plaintiff's right to specific performance; viz., personal incapacity—nature of contract, or fraud, &c. &c. attending its execution;—matters relating to the estate,—title—or consideration—plaintiff's conduct, &c., after contract;—election of other remedy.*

As to de-
fences which
negative in
toto plain-
tiff's right to
specific per-
formance.

We may next consider those grounds of defence which, assuming the existence of a *prima facie* valid agreement, go to negative in *toto* the right to specific performance; and these may, perhaps, be conveniently considered under the several heads of, 1st, matters relating to the personal capacity of the parties to contract; 2nd, matters relating to the nature of the agreement, or the circumstances under which it was entered into; 3rd, matters relating to the estate contracted for; 4th, matters relating to the title thereto; 5th, matters relating to the consideration; and 6th, matters relating to the conduct of the plaintiff subsequently to the date of the agreement.

(*t*) *Lord Irnham v. Child*, 1 Bro. 2 Ves. 299; *Price v. Dyer*, 17 Ves. C. C. 92; see 6 Ves. 332; Sug. 186. 356.

(*u*) See Sug. 170; *Legal v. Miller*, (*w*) Sug. 170.

As to the 1st of the above heads.—Personal incapacity on the part of the defendant to enter into the contract (*x*) is, of course, a sufficient defence to a suit for specific performance; unless, having recovered his contracting capacity, he has confirmed or adopted the agreement. We may here remark, that although intoxication, if excessive, amounts to a temporary deprivation of reason (*y*), and is a good defence although the party may not have been drawn into drink by the plaintiff (*z*), yet it has been held that the mere fact of the defendant having partaken freely of liquor at the time of entering into the contract, is not, in the absence of fraud, or of evidence that he was without the full understanding and knowledge of what he was doing, a reason for refusing specific performance (*a*).

Ch. XVIII.

1st.—Personal incapacity to contract—on part of defendant.

Intoxication.

Personal incapacity on the part of the plaintiff at the time of the contract, cannot, it is conceived, be set up as a defence to a suit for specific performance, if the plaintiff has recovered his capacity at the time of filing the bill or claim (*b*); but the existence of incapacity, at the time of the bill or claim being filed, would appear to be a good defence (*c*): and at any time during its existence, the contract, it is conceived, may be put an end to by due notice from the party bound (*d*); except where the incapacity consists in infancy, in which case the other party appears to have no power to rescind the contract (*e*); but the infant cannot, while an infant, enforce the contract (*f*): a contract by husband and wife for the sale of the wife's estate,

Personal incapacity on part of plaintiff, how far a defence.

(*x*) As to which, *vide supra*, Ch. I.

(*y*) See *Cooke v. Clayworth*, 18 Ves. 12, 16; *Cragg v. Holme*, *ib.* 14, n.; *Nagle v. Baylor*, 3 Dru. & War. 60.

(*z*) *Malins v. Freeman*, 2 Keen, see p. 34.

(*a*) *Lightfoot v. Heron*, 3 You. & C. 586.

(*b*) *Clayton v. Ashdown*, 9 Vin.

Abr. 393, 394; and see cases cited, *infra*, as to mutuality.

(*c*) *Flight v. Bolland*, 4 Russ. 298.

(*d*) See, and consider, *Martin v. Mitchell*, 2 Jac. & W. 428.

(*e*) See Chambers on Infancy, 442; *Shannon v. Bradstreet*, 1 Sch. & Lef. 58; *Smith v. Bowin*, 1 Mod. 25.

(*f*) *Flight v. Bolland*, 4 Russ. 298.

Ch. XVII.

may also, perhaps, be considered an exceptional case ; that is, if the purchaser at the date of the contract, be aware that the property belongs to the wife (*g*).

2nd. — Matters relating to the contract, &c.:—illegality.

As to the 2nd of the above heads.—Where the contract has been entered into for an illegal purpose, whether the same be expressly prohibited or be merely the subject of a statutory penalty, Equity will refuse to enforce it (*h*) : although it appears that if a legal agreement be intended in all events to be executed according to its terms, it will not necessarily be avoided by a collateral parol stipulation for something not *malum in se* but merely prohibited (*i*) : so, also, if the contract be in contravention of the rights of a third party (*k*), Equity will refuse to interfere ; as where it derogates from a previous voluntary settlement by the plaintiff vendor (*l*) : so, also, if the enforcement of the contract would be against public policy, as where it originated in the improper disclosure of evidence taken in a Chancery Suit (*m*) : so, also, if the completion of the contract would amount to a breach of trust (*n*) ; even by reason of any

Impolicy.

Breach of trust.

(*g*) See 2 Y. & C. C. C. 62.

(*h*) See *Thomson v. Thomson*, 7 Ves. 470 ; *Knowles v. Haughton*, 11 Ves. 168 ; *De Bagnis v. Armistead*, 10 Bing. 107 ; *Ewing v. Osbaldiston*, 2 Myl. & Cr. 53, 85 ; *Gas Light Company v. Turner*, 8 Sco. 609 ; and see *Tomlinson v. Manchester and Birmingham Railway Company*, 2 Rail. Ca. 104 ; *Ritchie v. Smith*, 6 C. B. 462 ; see, as to the difference between enforcing an illegal contract and asserting title to money which has arisen from it, *Sharp v. Taylor*, 2 Phill. 801. As to champerty, *vide supra*, p. 111, *et seq.* ; and see *Cook v. Field*, 14 Jur. 951.

(*i*) See *Carolan v. Brabazon*, 3 J. & L. 200.

(*k*) See *Harnett v. Yeilding*, 2 Sch.

& Lef. 549, 554 ; and see, and consider, *Peacock v. Penson*, 11 Beav. 355.

(*l*) *Smith v. Garland*, 2 Mer. 123 ; *Johnson v. Legard*, Turn. & Russ. 281.

(*m*) *Cooth v. Jackson*, 6 Ves. 12, 30.

(*n*) *Mortlock v. Buller*, 10 Ves. 292 ; *Ord v. Noel*, 5 Mad. 438 ; and see other cases cited, Sug. 240 ; also *Baylies v. Baylies*, 1 Coll. 546 ; *Bellringer v. Blagrove*, 1 De G. & S. 66 ; *White v. Cuddon*, 8 Cl. & F. 766 : we have seen that an agreement giving A. a right of pre-emption over B.'s estate, in consideration of A. not opposing B. on a sale by auction of other property, is not illegal ; *Galton v. Emuss*, 1 Coll. 243.

stipulation collateral to the mere agreement for sale; as where it was agreed that the purchaser should out of the purchase-money retain a debt due to him from the selling trustee (*o*); so, if an agreement be entered into by an agent, the omission of all usual and proper stipulations in favour of his principal (*p*), may be a reason for refusing specific performance.

Ch. XVIII.

Improvident contract by agent.

So, Equity has refused to enforce contracts on the mere ground of their hardship as against the defendants: as where one-half the purchase-money would, under a clause of forfeiture contained in the will of a prior owner, have gone to a third party (*q*); or, as where the contract provided that a road should be made by the vendor over property retained by him, and it appeared the making of the road would risk the forfeiture of the lease of part of the estate (*r*): so, it has been held, that a mortgagor, contracting to grant a lease, should not be compelled to pay off the mortgage in order to enable him to complete the contract (*s*): so, where a tenant for life, who, upon the settlement by him of lands of equal value, would have been absolutely entitled to the settled estates, contracted to sell them, the Court would not order him to procure and settle other lands, and so acquire a title (*t*): so, where the trustees of an estate, joined, expressly in that capacity, with the beneficial owners in a contract for sale, and all agreed to exonerate the estate from any incumbrances which might affect it, the Court refused to enforce this agreement against the trustees, when it seemed probable that the incumbrances might, and perhaps materially,

Hardship.

(*o*) *Thompson v. Blackstone*, 6 355.

Beav. 470.

(*s*) *Costigan v. Hastler*, 2 Sch. &

(*p*) *Helsham v. Langley*, 1 Y. & C. C. C. 175.

Lef. 160.

(*q*) *Faine v. Brown*, cited 2 Ves. 307.

(*t*) *Howel v. George*, 1 Madd. 1; and see *Southwell v. Nicholas*, cited p. 9, n.

(*r*) *Peacock v. Penon*, 11 Beav.

Ch. XVIII.

exceed the amount of purchase-money (*u*) : so, where the contract was intended by both parties to be the means of forwarding a common object which had utterly failed before the bill was filed, the Court refused to interfere (*u*).

Fraud, mistake, surprise, misrepresentation, or concealment.

So, Equity will refuse to enforce a contract which was procured by fraud, or duress (*x*), or was entered into under a common mistake (*y*), or, in many cases, a mistake only by the defendant (*z*) ; or under the influence of surprise (*a*) ; or was founded on a fraudulent or material misrepresentation or concealment of facts by the plaintiff (*b*).

Lord Langdale's remarks on misrepresentation.

The following remarks were, in a recent case, made by Lord *Langdale*, M. R., as to the effect, in Equity, of misrepresentation on the part of the plaintiff (*c*) :—" Cases have frequently occurred, in which, upon entering into contracts, misrepresentations made by one party have not been, in any degree, relied on by the other party. If the party to whom the representations were made himself resorted to the proper means of verification, before he entered into the contract, it may appear that he relied upon the result of his own investigation and inquiry, and not upon

(*u*) *Wedgwood v. Adams*, 6 Beav. 600 ; and see, as to hardship, *Talbot v. Ford*, 13 Sim. 173 ; *Hemingway v. Fernandes*, *ib.* 243 ; *Kimberley v. Jennings*, 6 Sim. 340.

(*w*) *Padrick v. Hanslip*, 14 L. T. 543.

(*x*) But the mere fact of a person being in prison at the time of signing the contract is no defence ; *Brinkley v. Hann*, 1 Dru. 175.

(*y*) *Stapylton v. Scott*, 13 Ves. 425, 427 ; *Lord Gordon v. Lord Hertford*, 2 Madd. 106 ; *Colyer v. Clay*, 7 Beav. 188.

(*z*) See *Malins v. Freeman*, 2 Keen, 25 ; *Harnett v. Yeilding*, 2 Sch. & Lef. 549, 554 ; *Howel v. George*, 1 Madd. 1, 11 ; but not

where the mistake is as to the legal consequences of an act ; *Great Western Railway Company v. Cripps*, 5 Ha. 91.

(*a*) See *Evans v. Llewellyn*, 2 Bro. C. C. 150 ; *Twining v. Morrice*, *ib.* 326 ; *Lord Townshend v. Slangroom*, 6 Ves. 328, 338 ; *Willan v. Willan*, 16 Ves. 72 ; and see *Story's Eq. Jur.* note to sect. 120.

(*b*) See Sug. 238, and cases cited *supra*, Ch. III. and Ch. IV. 63, *et seq.* ; and *Clermont v. Tasburgh*, 1 Jac. & W. 112 ; *Cadman v. Horner*, 18 Ves. 10 ; see *Barker v. Harrison*, 2 Coll. 546.

(*c*) *Clapham v. Shillilo*, 7 Beav. see p. 149.

the representations made to him by the other party : or if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such, as to make it incumbent on a Court of Justice to impute to him a knowledge of the result, which, upon due inquiry, he ought to have obtained ; and thus the notion of reliance on the representations made to him may be excluded.

“Again, when we are endeavouring to ascertain what reliance was placed on representations, we must consider them with reference to the subject-matter, and the relative knowledge of the parties. If the subject is capable of being accurately known, and one party is, or is supposed to be, possessed of accurate knowledge, and the other is entirely ignorant, and a contract is entered into, after representations made by the party who knows, or is supposed to know, without any means of verification being resorted to by the other, it may well enough be presumed, that the ignorant man relied on the statements made by him who was supposed to be better informed : but if the subject is in its nature uncertain,—if all that is known about it is matter of inference from something else, and if the parties making and receiving representations on the subject have equal knowledge and means of acquiring knowledge, and equal skill,—it is not easy to presume, that representations made by one would have such an influence upon the other.”

And an agreement, fair as between the parties, is not invalid merely because it may have been concocted and brought about by a third person with a fraudulent intention of benefiting himself (*d*).

Agreement fair, as between parties, is not avoided by fraud of third person.

Want of mutuality of remedy is a ground of defence not unfrequently relied on ; and respecting which the rules

Want of mutuality of remedy—

Ch. XVIII.
whether a
defence

of the Court seem somewhat undefined. The principle would seem to be one of clear Equity; viz., that a defendant ought not to be harassed with litigation founded on an agreement which he himself could not enforce if the plaintiff were to think fit to stop proceedings: for this reason, it was once doubted whether a plaintiff could enforce a written agreement which he himself had not signed: but it was ultimately decided (*e*) that he could; inasmuch as filing the bill binds him to the contract, and from that time there is mutuality (*f*): so, as we have seen, the personal incapacity of the plaintiff to enter into the contract, is, generally, if subsisting at the time of the bill being filed, a good defence (*g*).

when found-
ed on al-
leged want
of title in
plaintiff
vendor.

The non-mutuality-defence has generally been grounded upon the alleged entire, or partial, want of title in a plaintiff vendor: such want of title, it must be remembered, being urged as an objection to the existence or validity of the contract, and not by way of denial of his present ability to give to, or procure for, the defendant, his rights under the same. Thus, it has been held, that A. cannot enforce, against C., an agreement for the sale to him of B.'s estate; even although B. be willing to confirm the contract (*h*): and Sir *E. Sugden* considers it doubtful (*i*) "whether there is *any* case in which a man, knowing himself not to have any title, has been allowed to enforce the contract by procuring a title before the report" (*k*). But, as a general

(*e*) See 2 Coll. 161.

(*f*) *Martin v. Mitchell*, 2 Jac. & W. see p. 427; *Coleman v. Upcot*, 5 Vin. Abr. 528; *Dowell v. Dew*, 1 Y. & C. C. C. 345; *Butler v. Powis*, 2 Coll. 161; see *London and Birmingham Railway Company v. Winter*, Cr. & Ph. 57; but see also *Gaskarth v. Lord Louther*, 12 Ves. 107.

(*g*) *Vide supra*, p. 489.

(*h*) *Noel v. Hoy*, cited Sug. 241; and see *Tendring v. London*, 2 Eq. Ca. Ab. 680; *Armiger v. Clarke*, Bunb. 111.

(*i*) Sug. 241, n. (*p*).

(*k*) See, on this point, *Bryan v. Lewis*, Ry. & Moo. 386 (a case at Law on a sale of goods); *Lechmere v.*

rule, where no legal invalidity affects the contract, the enforcement of it in Equity is a matter of judicial discretion (*l*) ; and, in several cases, specific performance has been decreed at the suit of vendors who, contracting under the *bond fide* belief that they could make a good title, afterwards, on discovering that they had no title either legal or equitable, procured the concurrence of the necessary parties (*m*) : as, also, at the suit of vendors who had contracted to sell the fee simple, knowing that they had only a life estate or other limited interest, and relying on being able to procure the concurrence of the parties entitled in remainder (*n*) : and it seems by no means clear, whether, even in the extreme case of A. contracting to sell the estate of B., A. would not be entitled to specific performance, if, by procuring a conveyance from B., he were able to make a good title at the time fixed for the delivery of the abstract, or even at the time fixed for completion (*o*). Perhaps, in all such cases, the material point may be, whether the purchaser, upon discovering that the estate is not bound, has at once repudiated the contract, or has continued to negotiate upon the footing of its being still subsisting (*p*). However, in a modern case, where trustees with a power of sale exercisable with the consent of the tenant for life, entered into a contract, and filed a bill for specific performance, but did not procure the

Brasier, 2 Jac. & W. 289 ; *Dalby v. Pullen*, 3 Sim. 29 ; 1 Russ. & Myl. 296 ; and the cases cited *infra*, n. (*o*).

(*l*) 2 Y. & C. C. C. 64.

(*m*) See *Hoggart v. Scott*, 1 Russ. & Myl. 293, a case of mistake as to the proper parties to exercise a power of sale under a will ; *Chamberlain v. Lee*, 10 Sim. 444, where the frontage of the estate was found to belong to a third person ; *Eyston v. Simonds*, 1 Y. & C. C. C. 608, where the estate had escheated to the Crown ;

and see *Williams v. Carter*, cited Sug. 241.

(*n*) *Lord Stourton v. Meers*, cited 2 P. Wms. 630 ; *Wynn v. Morgan*, 7 Ves. 202 ; *Coffin v. Cooper*, 14 Ves. 205 ; *Salisbury v. Hatcher*, 2 Y. & C. C. C. 54.

(*o*) See *Mortlock v. Buller*, 10 Ves. 315 ; *Boehm v. Wood*, 1 Jac. & W. 421 ; and see 2 Y. & C. C. C. 64.

(*p*) See *Eyston v. Simonds*, 1 Y. & C. C. C. 608 ; *Salisbury v. Hatcher*, 2 Y. & C. C. C. 65.

Ch. XVIII. requisite consent until after the commencement of the suit, *V. C. Knight Bruce* intimated a doubt whether the bill should not be dismissed, although this had not been contended for by the defendant (*q*).

Nominal contractor.

The fact that the vendor contracted to sell his own estate, in the name of, or as agent for, another (*r*) ; or that the nominal purchaser was in fact the agent for a third person with whom the vendor has quarrelled upon other matters (*s*), or to whom he has given a bare refusal (*t*) to deal for the estate ; is not, in general, any defence to a suit for specific performance ; unless the case can be brought within the class of cases noticed *supra* (*u*), by showing that the misrepresentation was used as the inducement to the defendant to enter into the contract (*w*).

Insertion of penalty, no defence.

The insertion in the contract of a penalty in case of non-performance, is no defence to a suit for specific performance (*v*) : in a late case, a decree was made upon an agreement which took the shape of a bond (*y*).

Inability to recover damages at Law, how far a defence.

The circumstance that damages could not be recovered upon the contract at Law, is not, universally, a good defence to a suit for specific performance, although, as

(*q*) *Adams v. Broke*, 1 Y. & C. C. C. 627, 630.

(*r*) *Fellows v. Lord Gwydyr*, 1 Russ. & M. 83.

(*s*) *Hall v. Warren*, 9 Ves. 605.

(*t*) Sug. 242, citing *Lord Irnham v. Child*, 1 Bro. C. C. 92, see p. 95 ; *sed quære*, whether this doctrine can be extended to cases of refusal grounded on any particular and specified reason ; see 1 Coll. 219.

(*u*) P. 492.

(*w*) *Phillips v. Duke of Bucks*, 1 Vern. 227 ; *Scoll v. Langstaffe*, cited Lofft, 797 ; and see *Nelthorpe v. Holgate*, 1 Coll. 203. It appears that specific performance was decreed in *Phillips v. Duke of Bucks*,

see 14 Ves. 527, n. Upon which it may be remarked that the Duke's equity seems to have been of (according to modern notions) a very doubtful character : amounting, in substance, to this, viz., that he had sold the estates at an undervalue by way of bribe to the Chancellor before whom causes, in which the Duke was interested, were depending : see the account of the transaction from Roger North, cited Sug. 243, n.

(*x*) *Howard v. Hopkyns*, 2 Atk. 371.

(*y*) *Butler v. Powis*, 2 Coll. 156.

observed by Lord *Hardwicke* (z), "There are very few cases in which a Court of Equity can decree a performance of a covenant or agreement upon which there can be no action at Law, according to the words of the articles and the events which have happened:" Sir *E. Sugden* considers the result of the authorities (which are conflicting) to be, that although "Equity cannot contradict or overturn the grounds or principles of Law" it will yet decree specific performance of an agreement void at Law "if there is a clear ground for the interference of Equity according to the general rules of the Court" (a).

As to the 3rd of the above heads.—Upon defects in the estate itself, we may refer to former observations respecting misdescriptions and compensation (b): we may also remark that, although either the original non-existence of, or the want of a sufficient title to, a material part of the property, or that part of it which may have formed the inducement to the purchaser, is a sufficient defence to a bill for specific performance, yet mere non-existence does not, universally, as a ground of defence, stand so high as want of title; for it may, obviously, be often a very different matter to a purchaser whether he be simply unable to get a particular part of what he contracted for, or whether such part will be liable to be held by another person, and converted into a nuisance (c).

3rd. Matters relating to the estate:—original defects in, how far a defence;

It was considered, in a recent case, that the existence of a public nuisance in the immediate neighbourhood of a house agreed to be taken as a residence, and rendering it unfit for that purpose, its existence, however, being unknown to either party, although easily ascertainable by

public nuisance.

(z) See *Whitmel v. Farrel*, 1 Ves. 256, 258.

(a) Sug. 245, and see cases there referred to.

(b) *Supra*, Ch. III. and IV. As

to how far the purchases of several lots are connected, *vide infra*, p. 507.

And see the judgment in *Knatchbull v. Grueber*, 1 Mad. 167.

(c) See *S. C.*, *ib.* 153, 165.

Ch. XVIII. the vendor, is no defence to his suit for specific performance, although it will induce the Court to try the case strictly (*d*).

Destruction of estate, not a purchaser's defence.

4th. Matters relating to the title:—want of, considered as a vendor's defence.

We have already seen (*e*) that the accidental destruction or deterioration of the estate subsequently to the contract, is no defence to the vendor's bill for specific performance.

As to the 4th of the above heads—Want of title to the estate is a defence which may occasionally be available as well to vendor as to purchaser: as a general rule, however, a vendor will be compelled to convey his interest, if an imperfect one, in the estate, if the purchaser choose to accept it without compensation (*f*): so, he will be compelled to make good the contract out of any interest which he has subsequently acquired (*g*); or to procure the concurrence of parties who are bound to convey at his request (*h*), *e. g.*, trustees of the legal estate (*i*): so, if entitled to an equity of redemption, he will be compelled to redeem the mortgage, and obtain a conveyance from a mortgagee (*k*): so, a tenant in tail in remainder will be decreed to convey a base fee, and covenant to bar the remainders over upon becoming tenant in tail in possession (*l*): but Equity will not compel a vendor to procure the concurrence of parties whose concurrence he has no right to require; *e. g.*, a husband to procure the concurrence of his wife (*m*), or son (*n*), except, perhaps, where he has expressly agreed to procure such concurrence (*o*); or a tenant for life to

Cases in which it is available.

(*d*) *Lucas v. James*, 7 Ha. 410, 418.

(*e*) *Supra*, p. 116.

(*f*) See *Harnett v. Yeilding*, 2 Scho. & Lef. 554; Sug. 242.

(*g*) See cases cited *supra*, p. 360; and *Carne v. Michell*, 10 Jur. 910, V. C. E.

(*h*) See 1 Mad. 11.

(*i*) See Sug. 242; *Crop v. Norton*, 2 Atk. 74, 75.

(*k*) Sug. 253.

(*l*) *Lord Bolingbroke's case*, cited 1 Scho. & Lef. 19, n.

(*m*) *Emery v. Wase*, 8 Ves. 505, 514; *Howel v. George*, 1 Mad. 1, 6; see *Jordan v. Jones*, 2 Ph. 170.

(*n*) *Howel v. George*, *ubi supra*.

(*o*) Sug. 231, and cases there cited, but the point seems very doubtful; see Sug. 232.

procure the concurrence of trustees for sale of the reversion, they being under no obligation to comply with his request (*p*) : nor will it compel him to perfect the title by exercising a power of purchasing and settling another estate in lieu of that which he has contracted to sell (*q*) ; or to purchase and convey the tithes of an estate contracted to be sold as tithe free (*r*). It has even been held, that where a tenant for life, with the ultimate reversion in fee, contracted, as it appeared to the Court, merely as the agent of his trustees, (who had a power to sell the fee simple,) he was not bound, upon the contract being held void as against the trustees, to make it good out of the fee simple, which had subsequently vested in himself by the failure of the intervening limitations (*s*) : but this decision ought perhaps to be only cautiously followed (*t*) ; and, of course, the decision was different, when a tenant for life, similarly circumstanced, contracted in his own name, as if seised in fee simple (*u*) : but the Court will not decree specific performance by directing an invalid assurance to be executed by a tenant for life, which might encumber and embarrass remaindermen (*w*).

Where the want of title is only partial,—*i. e.*, where it affects only part of the estate, or only part of that interest in it which was agreed to be sold,—the question arises, whether the vendor can resist the purchaser's claim to specific performance with a compensation, or, to speak more accurately, an abatement of the purchase-money. This right generally, but not universally (*x*), exists in each class of cases (*y*) : thus, the want of title to even a consi-

Vendor when compelled to convey part of the estate with an abatement.

(*p*) *Thomas v. Dering*, 1 Keen, 729.

(*q*) *Howel v. George*, 1 Mad. 1.

(*r*) *Todd v. Gee*, 17 Ves. 273.

(*s*) *Mortlock v. Buller*, 10 Ves. 292, 316.

(*t*) See 2 Ball & B. 60.

(*u*) *Butler v. Powis*, 2 Coll. 156.

(*w*) *Ellard v. Lord Llandaff*, 1 Ball & B. 241 ; see 251.

(*x*) 1 Ves. & B. 353.

(*y*) 10 Ves. 316 ; 17 Ves. 401 ; 1 Ves. & B. 353 ; 3 Ves. & B. 192 ; 4 Sim. 127.

Ch. XVIII.

derable part of the estate is not necessarily a reason why the vendor should not convey the residue (*z*) ; but, cases might occur, where, on the ground of hardship, Equity would refuse to assist a purchaser ; as in the case put by Sir *E. Sugden* (*a*), of a vendor showing a good title to his mansion-house and park, but having no title to a "large adjoining estate held and sold with it." In a case before Sir *L. Shadwell*, V. C., where, upon a contract to sell the entirety of a lace manufactory, it appeared that the vendors had only nine-sixteenths, and that the remaining shares clearly belonged to another party, who had also a charge on the vendor's shares for a sum nearly equal to the purchase-money, the Court refused the purchaser specific performance with an abatement (*b*) : a decision which Sir *E. Sugden* suggests may be referred to the nature of the property, but otherwise disapproves of (*c*) : he seems, however, to consider that the decision would have been correct had the remaining shares been held by the vendors under a defective title. In a late case, the same learned Judge, when the vendors had agreed to sell two-sixths of certain leaseholds, and then found that they had only four-twentieths, decreed specific performance with an abatement ; observing, "this is very unlike a case where parties contract to sell the whole, but can only sell a part" (*d*) : from which remark, as in the case before the Court there was no question as to leaving part of the property in the hands of the vendors with a bad title, it may be inferred that his Honour, upon general principles, approved of his former decision. It seems, however, difficult to understand why specific performance should be refused in the former case ; or to distinguish it from the case put by Lord *Hardwicke*, of two tenants in common agreeing to sell the

(*z*) *Western v. Russell*, 3 Ves. & B. 187, 192.

(*a*) Sug. 359.

(*b*) *Wheatley v. Slade*, 4 Sim. 126.

(*c*) Sug. 360.

(*d*) *Jones v. Evans*, 12 Jur. 664.

entirety of an estate, and one of them dying, and a decree being made against the survivor in respect of his share, although the contract could not be enforced against the representatives of the deceased (*e*) : nor, it is submitted, can the defence be safely relied on by a vendor, who, having contracted to sell only shares in, and not the entirety of, a property, is found to have a defective title to *some* of such shares.

In another case, before the same learned judge, it was held, that a condition for rescinding the contract, if counsel should be of opinion that a marketable title could not be made, enabled the vendor to rescind, upon counsel rejecting the title to one third of the property (*f*).

Of course, no such question can be raised by a vendor, when, upon the purchase of several lots by the same purchaser, the title to one or more of such lots is found to be defective.

So, in general, when the vendor's *interest* is less than what he professes to sell, the purchaser may take what he can have, with an abatement (*g*) ; as in the case put by Lord *Eldon* (*h*), of a man contracting to sell the fee simple, and having only a term for one hundred years : so, where the contract was, in effect, for an absolute term of twenty-one years, and it was found that the actual term might determine by the cesser of certain lives, specific performance was decreed, with an abatement in respect of the difference between the absolute and defeasible interests (*i*) : there was a similar decision where a term was sold with the benefit of A.'s covenants for renewal, and such covenants were found to be not absolute but binding only a contin-

Vendor,
when com-
pelled to
convey
partial in-
terest in the
estate, with
an abate-
ment.

(*e*) See *Att.-Gen. v. Day*, 1 Ves. 460.
218, 224.

(*f*) *Williams v. Edwards*, 2 Sim. Ca. see 44 ; Sug. 346.

(*i*) *Dale v. Lister*, cited 16 Ves.

(*g*) See *Dyas v. Cruise*, 2 J. & L. 7 ; and see p. 11.

Ch. XVIII.

gent portion of his assets (*k*): so, where the agreement being for a term of thirty-one years, a title could be shown only to a term of twenty-one years, and a covenant for renewal of an additional term of ten years (*n*): so, it was admitted by Lord *Eldon*, (the case before him being that of a contract by a tenant for life for sale of the fee,) (*n*) that if a vendor, having a partial interest in an estate, enter into a contract, representing and agreeing to sell it as his own, the purchaser may take what he can have with an abatement: however, in a case (*o*) before Lord *Langdale*, M. R., when a tenant for life, with remainders to his first and other sons in tail, with remainder to himself in fee, contracted to sell the fee simple, speculating on the consent of the trustees for sale, which consent was eventually withheld, his Lordship refused to enforce specific performance to the extent of the life estate and remainder in fee, and with an abatement; but the decision is disapproved of by Sir *E. Sugden* (*p*); and, in a subsequent case (*q*), his Lordship appears to refer to his former judgment as if not altogether satisfied of its propriety: and in a recent converse case, of a person entitled in fee, subject to a life estate, agreeing to sell the fee simple in possession, speculating on the concurrence of the tenant for life, which was withheld, specific performance, with an abatement in respect of the life estate, was decreed by V. C. *K. Bruce*; and the vendor, having knowingly offered for sale an interest to which he was not entitled, was not allowed to avail himself

(*k*) *Milligan v. Cooke*, 16 Ves. 11, 12: but, *semble*, the Court will not now consider the comparative values of covenants; see *Ridgway v. Gray*, 1 Mac. & G. 109; and *Law v. Urlwin*, 16 Sim. 390.

(*m*) *Hanbury v. Litchfield*, 2 Myl. & K. 629.

(*n*) *Mortlock v. Buller*, 10 Ves. 315.

(*o*) *Thomas v. Dering*, 1 Keen, 729.

(*p*) Sug. 351; as to the difficulty of fixing the amount of abatement being a reason for refusing relief, see *White v. Cuddon*, 8 Cl. & Fin. 766, 792.

(*q*) *Graham v. Oliver*, 3 Beav. see p. 128; and see *Neale v. Mackenzie*, 1 Keen, 474.

of a condition purporting to reserve the right of rescinding the contract if the title should prove defective (*r*). Ch. XVIII.

In two cases above referred to (*s*), where the vendor's title was only contingently defective, it was held, that the purchaser might take the estate with an indemnity; but it has been settled, by subsequent decisions, that an indemnity will not be enforced against either party (*t*), unless it be provided for by special agreement (*u*).

Indemnity, neither given nor taken compulsorily.

And matters which would not be considered fit subjects for compensation as against a purchaser, may entitle him to an abatement of purchase-money if he elect to take the estate; *e. g.*, the existence of mining rights (*w*), or rights of common over the estate (*x*), or the want of a road which the vendor had agreed but was unable to make (*y*).

Vendor's and purchaser's rights in respect of abatement are not reciprocal.

If, however, the purchaser, at the time of entering into the contract, be aware of the existence of the outstanding interest, or that the vendor is agreeing for more than he can give, no abatement of purchase-money will, it is conceived, be allowed (*z*).

Right to abatement lost, by contracting for the estate with notice of the defect;

And where a plaintiff had obtained an agreement for an exchange with immediate possession, under a false representation to the defendant that the tenants of the latter would accede to the arrangement, he was not allowed to claim specific performance subject to the tenant's interests (*a*).

or by partial misrepresentation.

(*r*) *Nelthorpe v. Holgate*, 1 Coll. 203.

(*w*) *Seaman v. Fawdrey*, 16 Ves. 390.

(*s*) *Dale v. Lister*, cited 16 Ves. 7; *Milligan v. Cooke*, 16 Ves. 1.

(*x*) Sug. 353.

(*y*) *Peacock v. Penson*, 11 Beav. 355.

(*t*) *Balmanno v. Lunley*, 1 Ves. & B. 224; *Paton v. Brebner*, 1 Bli. 42, 66; *Aylett v. Ashton*, 1 Myl. & C. 105; *Nouaille v. Flight*, 7 Beav. 521; *Ridgray v. Gray*, 1 Mac. & G. 109, 111.

(*z*) See *Laurenson v. Butler*, 1 Sch. & Lef. 13, 19; *Harnett v. Yeilding*, 2 Sch. & Lef. 549, 560; *Nelthorpe v. Holgate*, 1 Coll. 203, 215.

(*u*) *Walker v. Barnes*, 3 Mad. 247; *Aylett v. Ashton*, 1 Myl. & C. 105.

(*a*) *Clermont v. Tasburgh*, 1 Jac. & W. 112.

Ch. XVIII.

Vendor how far bound to make good interest contracted for, out of his own higher interest.

It may occasionally happen, that the vendor's interest is found to exceed that which he contracted to sell; in which case he must, as a general rule, make good the latter to the best of his ability: for instance, where a vendor, in fact seised in fee, contracted to sell the estate as copyhold, stating it to be equal in value to freehold, it was held that he ought (but for other grounds of defence) to have conveyed the freehold (*b*): it has, however, been held, that, on an agreement to assign a lease, Equity cannot decree an underlease, although the assignment would induce a forfeiture; since the vendor's motive to the assignment may have been to escape the rent and covenants (*c*); but the defence, as Sir *E. Sugden* remarks, is one which could seldom be set up by a vendor (*d*).

Want of title, where a defence for purchaser declining an abatement. As where estate is of different tenure;

or is held in a different manner;

or no title is shown to the same extent of in-

If the purchaser be unwilling to complete with an abatement, he may resist specific performance on the ground of the tenure of the property, or of a material part of it, varying from that to which he is entitled under the contract; *e. g.*, he will not be compelled to take a term, (even for 4000 years) (*e*), or a copyhold (*f*), or mere sheep-walks, instead of a freehold (*g*):—Or on the ground of the property being held in a manner different from that which is expressed or implied in the contract; *e. g.*, he will not be compelled to take an assignment of an underlease, instead of an original lease (*h*); or of a redeemable, instead of an absolute interest (*i*); or of an improved, instead of a ground rent (*k*):—Or on the ground of no title being shown to that extent of interest which he contracted for: *e. g.*,

(*b*) *Twining v. Morrice*, 2 Bro. C. C. see 331.

(*c*) *Anon.* Sug. 342.

(*d*) *Ibid.*

(*e*) *Drewe v. Corp.*, 9 Ves. 368; and see *Fordyce v. Ford*, 4 Bro. C. C. 494; see *Wright v. Howard*, 1 Sim. & St. 190.

(*f*) *Twining v. Morrice*, 2 Bro.

C. C. see p. 331; Sug. 343; as to what is included in the contract, in the absence of any express description, *vide supra*, 51, *et seq.*

(*g*) *Vancouver v. Bliss*, 11 Ves. 458; see p. 466.

(*h*) Sug. 341.

(*i*) *Coverley v. Burrell*, Sug. 340.

(*k*) *Stewart v. Alliston*, 1 Mer. 26.

he cannot be compelled to take, instead of an estate in possession, a reversion expectant on a life estate (*l*), or on a subsisting lease (*m*); or a life estate, and (subject to an intervening estate tail), the remainder in fee, instead of the fee simple in possession (*n*); nor, having contracted for the entirety, can he be compelled to take undivided parts of the estate (*o*), even although the vendors were tenants in common of the entirety (*p*); and the same decision has been come to, where, on a contract for two-sevenths of an estate, a title could only be made to one-seventh (*q*); nor can he, on the purchase of a leasehold interest, be compelled to accept a term “considerably less” (*r*) than that contracted for; *e. g.*, a term for six instead of sixteen years (*s*):—Or on the ground of no title being shown to a material part of the estate; such materiality consisting, either in the proportion which such part bears to the entirety, or in its being important with regard to the enjoyment of the residue, or as possessing an adventitious value in the estimation of the purchaser (*t*); *e. g.*; “a purchaser cannot be compelled to take compensation for a large portion of the estate” (*u*); nor, having entered into a single contract for two estates, could he probably be compelled to take one without the other (*w*), although the estate with the defective title were let upon and sold subject to a fee-farm grant at a large rent (*x*): so where, on the purchase of a mansion and 700 acres, the title to 12 acres proved defective, such 12 acres being opposite the park gate and containing brick earth, which rendered it probable that

Ch. XVIII.
terest as is
contracted
for;

or no title
is shown to
a material
part of the
estate;

(*l*) *Collier v. Jenkins*, You. 295.

(*r*) Sug. 341.

(*m*) Sug. 346.

(*s*) *Long v. Fletcher*, 2 Eq. Ca.

(*n*) Sug. 349.

Abr. 5.

(*o*) *Dalby v. Pullen*, 3 Sim. 29;
affirmed, 1 Russ. & M. 296.

(*t*) See 1 Mad. 167.

(*u*) Sug. 359.

(*p*) *Att.-Gen. v. Day*, 1 Ves. 218,
224.

(*w*) See *Prendergast v. Eyre*, 2

Hog. 81.

(*q*) *Roffey v. Shallcross*, 4 Mad.
227.

(*x*) See *S. C.*, p. 94; Sug. 358.

Ch. XVIII.

or where incumbrances or liabilities exist which would affect its enjoyment;

or matters exist which increase the proposed liability of the purchaser.

they might be built upon, the purchaser was held free (*y*) ; so also where, on the purchase of a wharf and jetty, no title could be made to the jetty (*z*) :—Or on the ground of the existence of incumbrances or liabilities which would interfere with the enjoyment of the estate ; *e. g.*, liabilities to tithe, (if the estate is sold as tithe free or subject to a modus or commuted rent-charge (*a*),) to rights of mining (*b*), common (*c*), or waterway with power of entry for the purpose of making, opening, or cleansing water-courses, or to rights of entry for making reservoirs, or of planting ladders for the repair of adjoining houses (*d*), or to a right of sporting (*e*), or to the repairs of the chancel of a church (*f*), or to quit-rents or rent-charges, if of a large amount (*g*), have been held to be defects which do not admit of compensation. Upon a similar principle, it has been held, at Law, that a purchaser having contracted for the assignment of a subsisting lease, cannot be required to accept a new lease as original lessee ; his liability being greater under the lease than it would be under the assignment (*h*) :

(*y*) *Knatchbull v. Grueber*, 1 Mad. 153 ; 3 Mer. 124, see 141 ; and see 2 Myl. & K. 728.

(*z*) *Peers v. Lambert*, 7 Beav. 546 ; and see Sug. 357, for references to other cases in which some earlier decisions of a contrary tendency have been disapproved of.

(*a*) *Ker v. Clobery*, Sug. 366 ; *Binks v. Lord Rokeby*, 2 Sw. 222. The question of tithe free or not, has been said to be a question of fact and not of title ; *Smith v. Lloyd*, 2 Sw. 224, n. ; *sed qu.*, whether this statement, although theoretically accurate, is correct for practical purposes. Freedom from the tithe is a fact which does not relate to the physical condition of the property, and must, nevertheless, be proved by

the vendor before he can be said to have shown a good title to the estate as described in the contract.

(*b*) See *Seaman v. Vawdrey*, 16 Ves. 390 ; Sug. 353.

(*c*) *Ibid.*

(*d*) See *Shackleton v. Sutcliffe*, 1 De G. & S. 609, where only about four and a half out of thirty acres contracted for were subject to the easements.

(*e*) Sug. 352 ; see *Burnell v. Brown*, 1 Jac. & W. 172.

(*f*) *Forteblow v. Shirley*, cited 2 Sw. 223.

(*g*) *Portman v. Mill*, 1 Russ. & M. 696.

(*h*) *Mason v. Corder*, 2 Marsh. 332 ; see Sug. 341, where the case seems to be cited doubtfully.

so where, on the purchase of leaseholds, the lease was found to contain covenants to build additional houses, and to deliver them up at the end of the term, and the houses had not been built, but the covenant to build had been waived, it was held that the liability under the covenant to deliver up at the end of the term was a sufficient defence to the suit: although such liability might have been escaped by assigning the term to a pauper even only a day before its termination (i).

Ch. XVIII.

Where only part of an estate is affected by a liability which, if affecting the entirety, would enable the purchaser to resist specific performance, the purchaser's right to avoid the contract would seem to depend upon whether the part so affected is material to the enjoyment of the residue.

Or affect the enjoyment of a material part of the property.

Where, on the purchase of several lots by the same person, the title to one or more proves defective, this may or may not, according to circumstances, be a ground for the purchaser's resisting specific performance in respect of the remaining lots: an express agreement that the purchaser shall not take any unless he can have all, will be sufficient to blend the whole into one contract: "but the same complication may be effected, or rather evidenced, without any such agreement. It is a question of circumstances: the lots may be connected from their nature; it may be shown that the purchase of the one was made with reference to the other. A mere suggestion by the party, a mere statement of his inclination or fancy, will not be sufficient: nor may the proof of anything of a private nature, not known to the vendor, suffice: but where, upon matters known to both parties, he can ground his proof that the one transaction was dependent on the other, he complicates the two, so as to make the contract one, although there may have

Defect in title to one of several lots, how far a defence in respect of remaining lots.

(i) *Nounille v. Flight*, 7 Beav. 521.

Ch. XVIII.

been no express statement that he was to take none if he might not have all" (*k*).

Benefit of
defence,
how lost to
purchaser.

A purchaser will lose his right to resist specific performance on the ground of the estate being of a different tenure (*l*), or subject to a liability affecting its beneficial enjoyment, (*e. g.*, a right of sporting) (*m*), or of there being no title to a material part of it (*n*), or of a variation from the description in the particulars (*o*), if, after having become acquainted with the defect, he, without insisting thereon, proceed in the treaty (*p*); or, *à fortiori*, take possession (*q*): or if, although insisting on the objection, he take possession and endeavour to prevent the vendor from removing the defect (*r*).

Defects in
title, which
are not
available as
a defence to
purchaser:
limited
right of
common;
small quit-
rents or
rent-
charges;

And a purchaser has not been allowed to resist specific performance, on the ground that the estate having been sold with what was represented in general terms as an unlimited right of common the same proved to be a right of common only for sheep (*s*); or on the ground of the estate being subject to quit-rents or rent-charges of small amount (*t*).

tithe—
when the

So, where, on the sale of 140 acres, the particulars

(*k*) *Per* Lord Brougham, *Casamajor v. Strode*, 2 Myl. & K., see judgment, p. 725; *Poole v. Shergold*, 2 Bro. C. C. 118; Lord Eldon's remarks in *Drewe v. Hanson*, 6 Ves. 675, as stated Sug. 363.

(*l*) *Fordyce v. Ford*, 4 Bro. C. C. 494.

(*m*) *Burnell v. Brown*, 1 Jac. & W. 168.

(*n*) See *Drewe v. Hanson*, 6 Ves. 679.

(*o*) *Dyer v. Hargrave*, 10 Ves. 505, 508.

(*p*) 4 Bro. C. C. 498; 6 Ves. 679; 10 Ves. 508.

(*q*) 1 Jac. & W. 168.

(*r*) See *Calcraft v. Roebuck*, 1

Ves. jun. 221.

(*s*) *Howland v. Norris*, 1 Cox, 59.

(*t*) See *Esdaile v. Stephenson*, 1 Sim. & St. 122; *Portman v. Mill*, 1 Russ. & M. 696, and see Sir E. Sugden's remarks (V. and P. 354), disapproving of the decision in *Howland v. Norris*, *ubi supra*, that a tithe rent-charge of 14*l.* *per annum* was a matter for compensation. It may be remarked, that in the absence of any statement on the subject, the existence of a title-commutation rent-charge, or of tithe, must be presumed, and is no objection to the title, nor ground for claiming compensation.

stated that about 32 acres were tithe free, and no evidence of exemption could be produced, Lord *Eldon* held that the right to the tithe of this part of the property could not be considered the inducement to the purchase; and decreed specific performance with an abatement (*u*): so, where the purchaser's agent having by letter agreed to purchase an estate, consisting of a house and 19 acres of land, twelve of which were occupied by the house, offices, garden, and pleasure grounds; no mention being made of tithes; and on a more formal contract being prepared the great tithes were inserted by the purchaser's solicitor, but without any increase of price, or further treaty on the subject, and no title could be made to the tithes, Sir *J. Leach* held that the tithe could have formed no part of the inducement to the contract, and decreed specific performance with an abatement; (the same having been offered by the vendor (*w*)).

Ch. XVIII.

freedom
from tithe
was no part
of the in-
ducement
to the pur-
chase;

Upon the last case, we may remark, that the purchaser's agent appears to have actually entered by letter into a binding agreement to purchase subject to the tithe: as to the case before Lord *Eldon*, the decision ought scarcely to be considered to establish any general rule; the particulars represented 32 acres or thereabouts to be free from tithe generally, both small and great; and it is obvious that a purchaser buying an estate of 140 acres, say with an intention of building a residence on the land, and laying out gardens, &c., might deem it of material importance that even a very small part of the estate should be free from a liability to the payment of tithe in kind.

So, the circumstance of the estate being subject to a footway over and round it, has been held to be no defence to a suit for specific performance, its existence being patent, and the purchaser having made no inquiry on the

existence of
footway.

(*u*) *Binks v. Lord Rokeby*, 2 Sw.
222.

(*w*) *Smith v. Tolcher*, 4 Russ.
302.

Ch. XVIII.

subject (*x*) ; but the decision has not been generally approved (*y*) ; and the Courts would probably upon slight grounds come to a different decision in any case where an estate was subject to a right of way which materially affected its enjoyment.

5th. Matters relating to the consideration.

Inadequacy of, when a vendor's defence.

As to the 5th of the above heads.—The amount of the consideration to be paid may be a ground of defence by either party : and its inadequacy, or excess, will, of course, be determined with reference to matters as existing at the date of the contract, irrespectively of subsequent events (*z*). Inadequacy of consideration is not, however, a defence available to the vendor of an estate in possession (*a*), unless it can be shown to have originated in fraud, surprise, or misrepresentation, (whether wilful or not) (*b*), or improper concealment on the part of the purchaser (*c*), or in advantage taken of the distress of the vendor (*d*), or, according to Lord *Eldon*, “unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction” (*e*) ; but this dictum would probably at the present day be hardly sustained in its full extent (*f*).

Sale by auction ;

The fact of the sale being by auction, of course, much increases the difficulty of showing fraudulent inade-

(*x*) *Oldfield or Bowles v. Round*, 5 Ves. 508.

(*y*) See Sug. 377 ; but see also *contra*, *Martin v. Cotter*, 3 Jo. & L. 506.

(*z*) See Sug. 310 ; *Poole v. Shergold*, 2 Bro. C. C. 118, 119 ; *Coles v. Trecothick*, 9 Ves. 246 ; *supra*, 357.

(*a*) *Coles v. Trecothick*, 9 Ves. 246 ; *Burrowes v. Lock*, 10 Ves. 470 ; *Lowther v. Lowther*, 13 Ves. 103 ; *Borell v. Dann*, 2 Ha. 450.

(*b*) 1 Mad. 81 ; *Brealey v. Col-*

lius, You. 317 ; and see next note.

(*c*) See cases cited in n. (*a*) ; also *White v. Damon*, 7 Ves. 30 ; *Western v. Russell*, 3 Ves. & B. 187 ; *Deane v. Rastron*, 1 Anst. 64 ; *Cadman v. Horner*, 18 Ves. 10 ; *Turner v. Harvey*, Jac. 169 ; *Wall v. Stubbs*, 1 Mad. 80 ; Sug. 312 ; and see Ch. III. *supra*.

(*d*) See *Martin v. Mitchell*, 2 Jac. & W. 413, 423 ; *et vide supra*, 353.

(*e*) 9 Ves. 246 ; and see Jac. 282.

(*f*) See Sug. 314, n. ; see *Vigers v. Pike*, 8 Cl. & Fin. p. 645.

Ch. XVIII.

sale of un-
ascertained
interest.Considera-
tion un-
certain in
amount—
whether
question of
inadequacy
is thereby
excluded.

quacy (*g*) ; and the fact of neither party being aware of the value of the estate at the time of the contract, seems to render such a defence impracticable ; as in a case where a person sold, for what proved to be one-tenth only of its real value, the allotment to which he might be entitled under an expected Inclosure Award (*h*).

It is laid down by Sir *E. Sugden* (*i*), that “ if an uncertain consideration (as a life annuity) be given for an estate and the contract be executory, Equity, it seems, will enter into the adequacy of the consideration.” However, in a case (*k*) before Sir *J. Wigram*, V. C., his Honour, in deciding that an inadequacy of seven or eight *per cent.* was insufficient as a defence, made observations indicating a doubt whether the older cases are to be regarded as authorities ; they having been decided before the modern rule of treating inadequacy of price in contracts for the purchase of interests in possession as nothing more than an ingredient in evidence, was perfectly established : at any rate the circumstance of the contingency having turned out unfavourably to the vendor, is no ground of defence (*l*).

But although in sales of property in consideration of a life annuity, the Court will decree specific performance notwithstanding the death of the annuitant, it will inquire with some jealousy as to the fairness of the transaction, and require a clear case for specific performance under such circumstances (*m*).

(*g*) *White v. Damon*, 7 Ves. 30, 35 ; *Ex parte Latham*, *ibid*, 35, n. ; *Borell v. Dann*, 2 Ha. 450 ; *supra*, 357, n. (*c*).

(*h*) *Anon.* cited 6 Ves. 24 ; and see *Knight v. Majoribanks*, 11 Beav. 322 ; affirmed. 2 Mac. & G. 10.

(*i*) Sug. 311 ; citing *Pope v. Roots*, 1 Bro. P. C. 370 ; *Mortimer v. Cap-*

per, 1 Bro. C. C. 156 ; and *Jackson v. Lever*, 3 Bro. C. C. 605.

(*k*) *Bower v. Cooper*, 2 Ha. 408.

(*l*) *Coles v. Trecothick*, 9 Ves. 246 ; *Kenney v. Wexham*, 6 Mad. 355.

(*m*) *Per* Lord Cottenham, C., in *Davies v. Cooper*, 5 Myl. & C. 279.

Ch. XVIII.

Inadequacy
in sales of
reversion-
ary in-
terests.

We have already considered (*n*) those cases in which the Court has, upon the mere ground of inadequacy of consideration, set aside sales of reversionary interests, even after the conveyance has been executed: these cases, of course, are, *à fortiori*, authorities in favour of a defendant resisting specific performance. A degree of inadequacy which might be insufficient to induce the Court to interfere and set aside an executed contract, would, it is conceived, be a valid defence in such a suit (*o*): especially if the contract has not been acted on or attempted to be enforced until the reversion has fallen into possession (*p*).

Failure of
contingent
considera-
tion, in
general no
defence.

We have already seen that where the estate is sold for a contingent consideration, *e. g.*, a life annuity, the occurrence of the contingency is, in general, no defence to the purchaser's suit for specific performance (*q*).

Excess of
purchase-
money,
when a pur-
chaser's de-
fence.

So, on the other hand, it has been held that the mere excessive amount of the purchase-money, (even although not attributable to fraud, misrepresentation, or concealment on the part of the vendor), is a defence available to a purchaser (*r*): and Sir *E. Sugden* remarks that "few contracts can be enforced in Equity where the price is unreasonable, because contracts are not often strictly observed by either party: and if an unreasonable contract be not performed by the vendor, according to the letter in every respect, Equity will not compel a performance *in specie*" (*s*).

Remarks on
the doctrine.

It is, however, submitted, that such a defence by a purchaser deserves but little favour in a Court of Equity: there is a great difference between proofs of inadequacy and of excess of price. Inadequacy can be ascertained by reference

(*n*) *Supra*, 353, *et seq.*

supra.

(*o*) See Sug. 312, 314; *Ryle v. Swindells*, M'Clel. 519; *Playford v. Playford*, 4 Ha. 546; *Vigers v. Pike*, 8 Cl. & Fin. 645.

(*q*) *Supra*, 117, *et vide*, 511.

(*r*) *Day v. Newman*, cited 10 Ves. 300.

(*s*) Sug. 310.

(*p*) *Playford v. Playford*, *ubi*

to an extrinsic standard; viz., the general market value of similar property; and there is no difficulty in comparing money with money: but the Court when required to pronounce a price excessive, is called upon to do what it has, apparently, no satisfactory means of doing; viz., to determine what represents the money value, to a specified individual, of a specified estate: there is no extrinsic standard by which such value can be certainly determined. The mere fact of the contract having been entered into, knowingly and *bond fide*, may, it is conceived, be not unreasonably considered in itself to determine the real value of the estate, to the purchaser, at the time of the contract; whatever may be its value to third persons, and however much its value to the purchaser himself may have been altered by subsequent events (*t*).

Ch. XVIII.

As to the six of the above heads:—comprising those grounds of defence which consist of matters relating to the conduct of the plaintiff subsequent to the contract: these may be conveniently treated of with reference to—

6th—Conduct of plaintiff after contract—when a defence.

1st. Cases, where the defence is, that the plaintiff (whether vendor or purchaser) has released, expressly waived, or improperly delayed to enforce his rights under the contract.

Release, waiver of, or delay to enforce the contract.

2ndly. Cases, where the defence is, that the plaintiff (being the vendor) has, by his conduct, in respect of the estate, or towards the purchaser, forfeited his rights under the contract.

Conduct of plaintiff.

3rdly. Cases, where the defence is, that the plaintiff (whether vendor or purchaser) has already chosen his remedy and obtained satisfaction for the alleged breach of contract.

Election of other remedy for breach of contract.

(*t*) And *qu.* as to the hardship of the bargain being a defence, whether the Court should ever, merely on that ground, decline to enforce specific performance, if the circum-

stances, which are relied on as constituting the hardship, may be supposed to have been present to the mind of the defendant at the time of his entering into the contract?

Ch. XVIII.

Release,
waiver of,
or delay to
enforce the
contract.

As to the first class of cases.—An actual release by deed, or a mere written waiver of the contract, will, of course, be a good defence in Equity: so will a mere parol waiver; “but such a defence must be established with the greatest clearness and precision; and the circumstances of waiver and abandonment must amount to a total dissolution of the contract, placing the parties in the same situation in which they stood before the agreement was entered into” (*u*): and Sir *E. Sugden* remarks, that “the Court will look at the evidence with great jealousy” (*w*): and has held, judicially, that there must be as clear evidence of the waiver as of the existence of a contract (*x*).

What delay
in filing
bill, a de-
fence.

We have already considered (*y*), how far time is in Equity of the essence of the contract: even, however, where a clear right has existed to enforce the contract such right may be lost by delay in resorting to the Court; *e. g.*, an unexplained delay of seven years (*z*), and, in another case, of four years and eight months (*a*), in filing the bill, has in itself been considered a sufficient answer to the suit: where the bill was filed within fourteen months after a correspondence upon objections to the title had ceased, by the defendants returning no answer to the last letter which called for a distinct answer and threatened to file a bill, specific performance was decreed; the Court observing, that one could easily imagine that circumstances might have happened which would have made it peevish to file the bill immediately (*b*). Less time, however, will in general be allowed when the defendant has expressly

(*u*) *Per* Lord Lyndhurst in *Robinson v. Page*, 3 Russ. 114, 119; and see *Price v. Dyer*, 17 Ves. 364.

(*w*) Sug. 173.

(*x*) *Carolan v. Brabazon*, 3 J. & L. 200; as to the alteration of an agreement by either party, *vide supra*, p. 108.

(*y*) *Supra*, Ch. X., and as to a

mere option of purchase, *vide supra*, 98, n. (*q*).

(*z*) *Milward v. Earl of Thanet*, 5 Ves. 720, n.

(*a*) *Alley v. Deschamps*, 13 Ves. 225.

(*b*) *Marquis of Hertford v. Boore*, 5 Ves. 719.

Ch. XV111.

refused, than when he merely tacitly neglects, to perform the agreement: in cases of the former description, periods of delay, varying from two years and a half (*c*) to twelve months (*d*), have been held sufficient to bar the relief (*e*): it does not, however, appear, that time will run against the plaintiff so long as the question of completion remains under discussion (*f*); or while he is substantially in possession of the benefit contracted for (*g*); the modern tendency of the Court has been to require the plaintiff to be prompt in seeking his equitable remedy (*h*).

As to the second class of cases.—We have already seen that any act by the vendor—*e. g.* the fall of ornamental timber—which prevents his giving to the purchaser that which was substantially the subject-matter of the contract, will be a defence to his suit for specific performance (*i*); but that he may, in due course of husbandry, cut coppice, and get in crops, accounting to the purchaser for the net profits (*k*).

Waste of estate, when a defence;

So, the circumstance of the vendor having turned the purchaser out of possession, (which he was entitled to under the contract, and had been allowed to take,) has been held a sufficient defence to the vendor's suit (*l*).

or ejectment of purchaser rightfully in possession.

So, if the plaintiff refuse or be unable to perform a material stipulation under the contract—as if it had been

Or inability of vendor to perform a material

(*c*) *Stewart v. Smith*, 6 Ha. 222, note.

(*d*) *Watson v. Reid*, 1 Russ. & M. 236.

(*e*) See *Heophy v. Hill*, 2 Sim. & St. 29, about two years' delay; *Walker v. Jeffreys*, 1 Ha. 341, two years; *Southcomb v. Bishop of Exeter*, 6 Ha. 213, nineteen months.

(*f*) See *Southcomb v. Bishop of Exeter*, 6 Ha. 213; and *Moxhay v. Inderwick*, 11 Jur. 837, where a correspondence upon the shape of the conveyance was carried on at

considerable intervals for nearly four years; and see *Gee v. Pearse*, 2 De G. & S. 325.

(*g*) *Clarke v. Moore*, 1 J. & L. 723; but delay will be material on the question of costs: see *Burke v. Smyth*, 3 J. & L. 193.

(*h*) *Southcomb v. Bishop of Exeter*, 6 Ha. 213.

(*i*) *Supra*, 116.

(*k*) *Ibid*.

(*l*) *Knatchbull v. Grueber*, 3 Mer. see 144.

Ch. XVIII.

stipulation
under the
contract.

agreed that the vendor should become tenant of the estate for a term of fourteen years at a specified rent, and he become insolvent (*m*)—this may be a reason for refusing specific performance against the purchaser; but this defence was overruled when the agreement was for merely a yearly tenancy, and especially as the vendor's embarrassments were known to the purchaser (*n*).

Action
brought and
damages
recovered.

As to the third class of cases.—If the plaintiff has brought an action at law and has recovered damages for breach of contract he will be held to have elected his remedy (*o*).

(10.) *As to the proceedings in the suit;—viz. payment of purchase-money into Court;—reference of title and proceedings thereon—decree for plaintiff—conveyance—decree dismissing Bill.*

Purchaser
in possession,
when
ordered to
pay purchase-
money into
Court.

Where the purchaser is in possession of the estate, he may, even before answer (*p*), be ordered upon motion to pay the purchase-money into Court; this relief it seems will be afforded, when “the possession by the purchaser, without payment of the purchase-money, is according to the intention of the parties, or is held according to it, but the purchaser has exercised improper acts of ownership, for example cutting timber, or selling the estate” (*q*), or dealing with it in a manner contrary to former usage, or to the usual course of husbandry (*r*); “but not,” according to Sir *E. Sugden*, “where the possession is taken under the contract, or is consistent with it, and the purchaser has not dealt improperly with the estate” (*s*); this last

(*m*) See 1 Y. & C. Exch. 228.

(*n*) *Lord v. Stephens*, 1 Y. & C. Exch. 222, 228; *sed qu.* whether the length of the tenancy is material; see Sug. 338.

(*o*) See *Sainter v. Ferguson*, 1 Mac. & G. 286.

(*p*) *Dixon v. Astley*, 1 Mer. 133; *Blackburn v. Stace*, 6 Mad. 69.

(*q*) Sug. 251; Dan. Ch. Prac. by H. 1642.

(*r*) *Osborne v. Harvey*, 1 Y. & C. C. C. 116.

(*s*) Sug. 251.

proposition must, however, be taken subject to the following qualifications, viz. that where a purchaser has been *long* in possession, *e. g.* three years (*t*), he will be required either to give up (*u*) possession or to pay in his purchase-money within a short date, *e. g.* two months (*w*); and this was ordered in a case where, according to the agreement, the greater part of the purchase-money was to remain on mortgage of the estate for twelve months after the conveyance (*x*): a similar order was made, in a modern case, by Lord *Langdale*, although the purchaser had taken possession for the benefit of the vendor, and expressly without prejudice to any objection he might afterwards make to the title, and had retained possession for about a year and a half: and although the above proposition of Sir *E. Sugden* was cited in argument, his Lordship seemed to consider that, as a general rule, a purchaser could not be allowed to retain both the estate and the money (*y*).

In a case where, according to the bill, there was a parol agreement for sale at 80*l.* per acre, with possession given of five acres, but, according to the answer, only of three acres, a motion that the purchaser should pay in the purchase-money for the five acres, or else for the three acres, was refused (*z*).

In a case where there was a sort of mixed possession, the greater proportion of it being in the purchaser, but

Ch. XVIII.

Purchaser allowed to elect,—either to pay or vacate possession.

Quantity of land taken when uncertain, no order made.

Under special circumstances, receiver appointed.

(*t*) *Tindal v. Cobham*, 2 Myl. & K. 385; *Younge v. Duncombe*, You. 275.

(*u*) Where possession having been taken by an agent in mistake, had been restored, the motion for payment was refused; *Tomlinson v. Manchester and Birmingham Railway Company*, 2 Rail. Ca. 104.

(*w*) *Younge v. Duncombe*, You. 275.

(*x*) *S. C.*, *sed qu.* whether the purchaser, if the point had been

pressed on the Court, would not have been allowed to give his bond or covenant for the amount agreed to be left on mortgage; and see the judgment in *Clarke v. Elliott*, 1 Mad. 606, 607.

(*y*) *Fowler v. Ward*, 6 Jur. 547; and see *Adams v. Heathcote*, 10 Jur. 301, V. C. E.; *Smith v. Lloyd*, 1 Mad. 83; and *Wickham v. Evered*, 4 Mad. 53.

(*z*) *Benson v. Glastonbury Canal Company*, 1 C. P. Coop. N. R. 350.

Ch. XVIII.

the vendor not being entirely out of possession, and part of the purchase-money was paid, but the purchaser was in a state of insolvency and admitted his intention to convey the estate to trustees for the benefit of his creditors, the Court appointed a receiver (*a*).

Or occupation rent set on estate.

In another case an occupation rent was set on the estate deducting interest at 5*l. per cent.* on the deposit (*b*): so where a yearly tenant in possession filed a bill claiming an option to purchase, the Court would only restrain an ejectment by the landlord on the terms of the tenant continuing to pay the rent, without prejudice (*c*).

Vendor plaintiff seeking injunction, when obliged to pay in deposit.

Where a vendor in possession files a bill for specific performance and to restrain the purchaser from proceeding at Law for his deposit, he can generally obtain the injunction only on the terms of paying the deposit into Court; unless his retention of the estate be the fault only of the purchaser; as where the vendor is able and willing to make a good title and the other improperly refuses to complete (*d*).

Injunction against waste by purchaser in possession.

A purchaser in possession, even under the contract, but who has not paid his purchase-money, may be restrained on motion from waste or destruction of the property; *e. g.*: from felling timber (*e*): so, the vendor may, under special circumstances, as where he has given up possession and received part of the purchase-money (*f*), be restrained from conveying away the legal estate, or contracting to resell the property (*g*): but, in general, in a suit for specific performance the purchaser is not entitled to restrain the owner from dealing with his property; as a

Against exercise by vendor of his legal rights.

(*a*) *Hall v. Jenkinson*, 2 Ves. & B. 125; see the judgment, 126.

(*b*) *Smith v. Jackson and Lloyd*, 1 Mad. 618.

(*c*) *Pyke v. Northwood*, 1 Beav. 52.

(*d*) *Wynne v. Griffith*, 1 Sim. &

St. 147, 149.

(*e*) *Crockford v. Alexander*, 15 Ves. 138; *vide supra*, p. 118, 119.

(*f*) *Spiller v. Spiller*, 3 Sw. 556.

(*g*) *Echliff v. Baldwin*, 16 Ves. 267; *Curtis v. Marquis of Buckingham*, 3 Ves. & B. 168.

different doctrine would operate to control the rights of ownership, although the agreement were such as could not be performed (*h*): but in a suit to enforce an agreement for sale of a next presentation, the vendor may be restrained from presenting any clerk not nominated by the purchaser; and the injunction has even been extended so as to restrain the Bishop from presenting, except on the like nomination, or from collating in the event of a lapse pending the suit (*i*).

Where the question of title is the only one in dispute, the Court, in order to save time (*k*), will, at the instance of either party, direct a reference to the Master upon motion before the hearing, or even, at the instance of the plaintiff (*l*), before answer (*m*); unless the defendant's counsel can state that other matters are in question (*n*); and this, although the only question of title is one which might be conveniently determined at the hearing without a reference (*o*), or although specific performance be resisted upon the ground that time was of the essence of the contract, and that a good title was not shown within the specified period (*p*): such an order, if obtained by the plaintiff before answer, will not preclude the defendant from making any defence which he thinks proper (*q*): and in a suit commenced by claim under the new Orders of April, 1850, the order of reference is of course, unless sufficient cause to the contrary is shown by the defendant on the hearing of the claim (*r*).

Reference of title, on motion before hearing.

Unless contract resisted on grounds other than of title.

(*h*) *Per* Lord Eldon in *Spiller v. Spiller*, *ubi supra*; *Turner v. Wight*, 4 Beav. 40; see *Haigh v. Jaggard*, 2 Coll. 231. & B. 224; *Bennett v. Rees*, 1 Keen, 408.

(*i*) *Nicholson v. Knapp*, 9 Sim. 326. (*n*) *Matthews v. Dana*, 3 Mad. 470.

(*k*) *Dorin v. Harrey*, 9 Jur. 648; 15 Sim. 49. (*o*) *Curling v. Flight*, 5 Ha. 248.

(*l*) See *Curling v. Flight*, 5 Ha. 247. 583. (*p*) *Foxlowe v. Amcoats*, 3 Beav. 496.

(*m*) *Balmanno v. Lumley*, 1 Ves. 496. (*q*) *Emery v. Pickering*, 13 Sim. 583.

(*r*) But the agreement must be

Ch. XVIII.

Frivolous
defence.

May be dis-
posed of on
motion—
semble.

Objections
to title,
what are,
for purposes
of motion.

It is stated by Sir *E. Sugden*, that “in every case, where the answer, upon reasons solid or frivolous, insists that the agreement ought not to be executed, the Court must first dispose of the question raised” (*s*) ; and according to some authorities, such question could only be disposed of upon the hearing (*t*). However, in a recent case, where the question arose whether a defence, even although frivolous, is necessarily an answer to the motion, Sir *J. Wigram*, V. C., observed, that such has not been the practice, at least since the case of *Withy v. Cottle* (*u*). Since the decision in that case the practice of the Court has been to look into the answer for the purpose of seeing whether that which the defendant calls an objection to performing the contract is an open question. A point raised by the answer as an objection other than to title, may be so surrounded and governed by authority, as, in fact, to create no difficulty, and to be, in effect frivolous ; and in that case the Court does not yield to the objection by refusing the reference (*w*).

It has been decided by the same learned Judge that for the purposes of such a motion, objections to the title mean such objections as can only be properly the subject of adjudication upon the investigation of the title ; *e. g.* objections depending on the application of conditions of sale, (the propriety or validity of the conditions themselves not being questioned) (*x*) ; or on the liability of the vendor to furnish any particular evidence of title, or on his ability to furnish such evidence (*y*).

admitted by the defendant, or proved by the plaintiff, *supra* ; and see *Marshall v. Davies*, 14 Jur. 997, V. C. R.

(*s*) Sug. 416 ; and see cases there cited.

(*t*) See *Blyth v. Elmhirst*, 1 Ves. & B. 1 ; *Withy v. Cottle*, 1 Sim. & St. 174 ; *Gordon v. Ball*, 1 Sim. &

St. 178.

(*u*) Turn. & Russ. 78.

(*w*) *Wood v. Machu*, 5 Ha., see p. 161 ; and see *Boyes v. Liddell*, 1 Y. & C. C. C. 133.

(*x*) *Wood v. Machu*, 5 Ha. 158.

(*y*) *Curling v. Flight*, 5 Ha. 248.

And since the object of granting the reference before the hearing is merely to save time, the Court has refused such a motion by a plaintiff-vendor, who, for eleven months after answer, had taken no proceedings in the suit (*z*).

Ch. XVIII.

Order refused on ground of delay;

And, of course, no reference will be directed even at the hearing, if the Court be satisfied that the purchaser has intentionally waived his right to investigate the title (*a*): and it has been refused on the mere ground of long possession and vexatious objections on the part of the purchaser (*b*).

or waiver of title;

We have already seen that a purchaser who accepts a title, conditionally on the vendor complying with a specified requisition, which is not complied with, is entitled to a general reference of title (*c*).

conditional acceptance of title—effect of.

The reference, when directed, should be complete and extend to all that regards the title, but not to other matters (*d*): the order is, to inquire whether the vendor can, at the time of the reference (not at the date of the contract) show a good title (*e*), and it should contain a direction that if the Master shall find that a good title can be shown, he shall inquire when it was first shown: and so the order is now always made; unless, for some reason stated at the time, and by the express direction of the Court, the inquiry as to the time when a good title was first shown, be omitted (*f*); so, also, an inquiry will, if desired, be directed, whether the defendant ever and when required of the plaintiff any and what evidence in

Order of reference, subject-matter and form of.

(*z*) *Dorin v. Harvey*, 9 Jur. 648; 15 Sim. 49.

(*c*) *Supra*, p. 217; *Lesturgeon v. Martin*, 3 Myl. & K. 255.

(*a*) *Fleetwood v. Green*, 15 Ves. 594; *Margravine of Anspach v. Noel*, 1 Madd. 310; *Burroughs v. Oakley*, 3 Sw. see p. 168, and earlier cases cited in argument; *Blacklow v. Laws*, 2 Ha., see p. 47.

(*d*) *Jennings v. Hopton*, 1 Madd. 212; *Bennett v. Rees*, 1 Keen, 405.

(*e*) *Langford v. Pitt*, 2 P. Wms. see 630; Dan. Ch. Prac. by H., 982.

(*f*) *Per* Lord Langdale in *Bennett v. Rees*, 1 Keen, 409.

(*b*) *Hall v. Laver*, 3 Y. & C. 191.

Ch. XVIII.

proof of a point material to the title (*g*) ; but not as to a matter which has no reference to the title ; *e. g.*, the sufficiency of the abstract delivered (*h*). The order should also contain the usual directions for the production of deeds, &c. and for the examination of the parties on oath, and reserve further directions and costs (*i*).

Form of, in
suit com-
menced by
claim.

The form of the order of reference in a suit commenced by claim under the Orders of April, 1850, is as follows (*k*) ; viz., “that it be referred to the Master of this Court in rotation to inquire whether a good title can be made to the property comprised in the agreement in the plaintiff’s claim mentioned : and in case the said Master shall be of opinion that a good title can be made, it is ordered, that he do state at what time it was first shown that such good title could be made ;” and reserves further directions and costs : and under the 17th Order the Master has a general authority to cause the parties to be examined upon interrogatories and to produce deeds, books, papers, and writings, as he shall think fit.

Pending the reference, the defendant cannot, under the 114th Order of May, 1845, dismiss the bill for want of prosecution (*l*).

Proceed-
ings on re-
ference ;
Master pro-
ceeds on
abstract ;

No state of facts is carried in, but the Master proceeds upon the abstract : and he will assume its correctness and not require the production of the title deeds, unless their production is insisted on by the purchaser (*m*) : on “liti-
gated questions of title, written objections are brought in by the party objecting ; and the Master is either attended by counsel on both sides, or the written opinions of counsel upon the abstract already given are produced to him, according to circumstances” (*n*) : and he has the same

(*g*) *Ibid.* 408.

(*l*) *Collins v. Greaves*, 5 Ha. 596.

(*h*) *Ibid.*

(*m*) See Daul. Ch. Prac. by H.

(*i*) *Winterbottom v. Lingham*, 9 1168.

Sim. 654.

(*n*) *Ibid.*

(*k*) See Schedule C. No. 10.

power to examine witnesses on a reference upon motion, as he would have if it were under a decree (*o*). Ch. XVIII.

The usual and recognised (*p*) practice, is, for the Master, instead of personally perusing the abstract, to submit it to a conveyancing counsel, of his own selection : but although he may avail himself of the assistance afforded him by the opinion thus obtained, he ought not, in his report, to state it as the foundation of his finding (*q*). usually takes counsel's opinion thereon :

"In the prosecution of the order for reference, the Master, in his discretion, may examine the parties upon interrogatories, and receive evidence upon affidavit, or by the examination of witnesses before him either by written interrogatories or *vivâ voce*. He may also call for such deeds and other muniments as are necessary to the elucidation of the title" (*r*). what evidence he may receive and require.

A purchaser will not be compelled to take a doubtful title (*s*) ; or a merely equitable title (*t*), unless the sale be under a decree of the Court (*u*), although he may have consented to go before the Master upon a reference as to the title to the estate directed in an administration suit (*w*) ; nor will he be compelled to take an equitable title which his vendor, who purchased from the Court, was himself obliged to accept (*x*) ; nor will a case be sent for the opinion of a Court of Law without his consent (*y*) ; and if, upon the return of a certificate in favour of the title, the Court has any doubt upon the point, a case will be directed to another Purchaser need not accept doubtful or merely equitable title ;

or consent to a case being sent to Law .

(*o*) *Woodroffe v. Titterton*, 8 Sim. 238.

(*p*) See *Flower v Walker*, 1 Russ. 408.

(*q*) *In re Collard*, 10 Beav. 334.

(*r*) Danl. Ch. Prac. by H. 1169 ; and see *Winterbottom v. Ingham*, 9 Sim. 654 : and 17th Order of April, 1850, *supra*, p. 522.

(*s*) Sug. 506 ; *Blosse v. Lord Clanmorris*, 3 Bligh, 62 ; and other cases

cited : see the argument of defendant's counsel in *Howarth v. Smith*, 6 Sim. 161.

(*t*) *Ibid.* and *Law v. Urwin*, 1 Sim. 377.

(*u*) *Infra*.

(*w*) *Cann v. Cann*, 1 Sim. & St. 284.

(*x*) *Lord Waltham's case*, Sug. 52

(*y*) *Roake v. Kidd*, 5 Ves. 647.

Ch. XVIII. Court of Law (z), and notwithstanding such certificate, the Court of Chancery will entertain and act upon any equitable objection to the title (a).

doubt must
be a reason-
able doubt.

The doubt, whether upon law or fact, must, in order to be a ground for rejecting the title, be a reasonable doubt: according to Lord *Hardwicke*, "the Court, in carrying agreements into execution, must govern itself by a moral certainty, for it is impossible in the nature of things that there should be a mathematical certainty of a good title; there are often suggestions of old entails, and often doubts what issue persons have left, whether more or fewer, and yet these were never allowed to be objections of that force as to overturn a title to an estate" (b): and the above remarks are cited with approbation by Sir *W. Grant* (c), and Sir *E. Sugden* (d): however, in a case before Mr. Baron *Alderson*, upon the above dicta as to moral and mathematical certainties being cited, the Court observed, "that only means that you cannot prove a title by means of reasoning, but only with the help of evidence; those sort of apothegms get a great deal more reputation than they deserve" (e).

Questions
of Law
more readily
decided
against pur-
chaser than
questions of
construc-
tion.

As to doubts depending on a point of Law, Sir *E. Sugden* suggests, that a Judge "may feel himself more at liberty to decide a general point of Law between vendor and purchaser than a question of construction of an informal instrument, which can afford no precedent, and upon which men may naturally differ" (f): and even an abstract point of law will not, if considered doubtful, be decided against a purchaser even by the House of Lords (g): and where the

(z) Sug. 506; Dan. Chan. Prac. by H. 1088; it appears that in the first instance the plaintiff selects the Court; *Walton v. Holt*, 13 Jur. 355.

(a) *Sheffield v. Lord Mulgrave*, 2 Ves. jun. 526.

(b) *Lyddal v. Weston*, 2 Atk. 20.

(c) *Hillary v. Waller*, 12 Ves. 252.

(d) Sug. 518.

(e) *Hutchinson v. Morritt*, 3 Y. & C. 554.

(f) Sug. 508.

(g) *Blosse v. Lord Clanmorris*, 3 Bli. 62, 71.

purchaser objects to the title upon the authority of a decision of a Court of Law in a similar case, the Court of Chancery, although entertaining a strong opinion against the correctness of such decision, will not overrule it, but will direct a case (*g*).

Ch. XVIII.

If there be an appeal, the fact of the title having been held bad in the Courts below will not be a reason for the Judge of the appellate Court considering the title too doubtful to force on a purchaser, if he himself entertain a clear opinion in its favour (*h*); and Lord *Eldon*, where a purchaser persisted in an objection, which, although doubtful on the previous authorities, had been decided in favour of the same vendor by a recent judgment of his Lordship, from which there had been no appeal, decreed specific performance *with costs* (*i*).

Decision of Court below, if reversed on appeal, does not render title doubtful.

As to doubts respecting facts, we may here refer to the observations already made (*k*) as to presumptions of facts as between vendor and purchaser.

As to doubts respecting facts.

In a case where it appeared that upon a previous purchase a tenant for life had, after the contract, exercised a power of appointment in favour of one of his sons, and that the father, mother and son had thereupon conveyed to the purchaser, the money being expressed to be paid to the three conveying parties, Lord *Eldon* held that the mere possibility of the appointment having been founded on a corrupt agreement between the father and son was not a valid objection to the title (*l*).

Title not considered doubtful on mere suspicion of fraud.

Even the mere fact that a suit is pending, in which part of the lands are claimed adversely to the vendor, is not, in itself, an absolute objection to the title; and in such a case, the Master should state the point in question in the ad-

Pendency of adverse suit, no ground for reporting against title.

(*g*) *Peppercorn v. Peacock*, 4 Jur. 1122.

(*k*) *Supra*, 166, *et seq.*

(*h*) See Sug. 512.

(*l*) *M^cQueen v. Farquhar*, 11 Ves. 467.

(*i*) *Biscoe v. Wilks*, 3 Mer. 456.

Ch. XVIII.

verse suit, and his opinion thereon (*m*). The Court, however, it is conceived, would not, unless the point were perfectly clear, or, perhaps, in any case, compel the purchaser to complete until the adverse claim had been decided on. In a case before Lord *Langdale*, where the intended purchaser had received notice of a claim to the estate, founded on the alleged invalidity of an appointment, which claim, however, had not been followed up by any act, and no fact had been stated as a foundation for it, his Lordship decided that the purchaser was bound to complete; but added, "if it were possible to institute any inquiry as to the facts which took place I think it ought to be done, for the satisfaction of the purchaser; but I do not see how that can be" (*n*): in a late case, where the vendor claimed under a suspicious will, and the heir had failed in an action of ejectment and in a subsequent motion for a new trial, Lord *Cottenham*, reversing the Vice-Chancellor's decision, held that, as means existed of bringing the objection to a test, the Court would do so, before compelling the purchaser to take the title: and required the vendor to file a bill to establish the will against the heir (*o*).

Adverse right not likely to be enforced, held not to render title bad.

An anonymous case is cited by Sir *E. Sugden* (*p*), in which a man having agreed to buy an estate with mines, and objecting that the mines were under a common, over which others had a right of common, Lord *Eldon*, observing on the improbability of disturbance, and that nominal damages only would probably be given in the event of an action, decreed specific performance; but the case seems to be of very questionable authority: Sir *E. Sugden* considers (*q*) that the decision must have

(*m*) *Osbaldeston v. Askew*, 1 Russ. 160.

(*n*) *Green v. Pulsford*, 2 Beav.

see p. 75.

(*o*) *Grove v. Bastard*, 2 Phill. 619.

(*p*) Sug. 519.

(*q*) *Ibid.* 520.

turned on the improbability of disturbance: but it may reasonably be doubted, whether the supposed absence of any adequate motive for parties to assert their rights by litigation constitutes that sort of improbability upon which a purchaser is bound to rely; however, in an earlier case, the existence in the Crown of a right to the mines under the estate, but without a reservation of a right of entry, was held by Lord *Hardwicke* to be no objection to the title; it appearing that no search had been made for mines for upwards of a century, and that probably no mines existed, and that the Crown's right never had been and probably never would be exercised (*r*); so a right of re-entry by the Crown, which the Court considers incapable of being enforced, is no objection to the title (*s*).

Where a necessary party to the title is, neither in Law nor Equity, subject to the control of the vendor, but has an independent interest, and no evidence is furnished of a legal or equitable obligation on the part of such stranger to concur in the sale, the Master should report against the title (*t*) on the ground of such non-concurrence; not that a good title can be made upon the stranger concurring (*u*): but where such necessary party is bound to concur, as in the case of a mortgagee, the Master may report in favour of the title (*w*): the report, however, should, it is conceived, be, that a good title can be shown subject to the incumbrance, and that the incumbrancer is bound to

Outstanding interest, when a ground for reporting against title.

(*r*) *Lyddal v. Weston*, 2 Atk. 19. The case seems to have been decided under the idea that the Crown, no right of entry being reserved, could neither work nor authorize others to work the mines, unless they were first opened by the owner of the soil; but it seems doubtful whether this is good law; see *Case of Mines*, Plow.

313; *Seaman v. Vawdrey*, 16 Ves. 393; *Bainbridge on Mines*, 41.

(*s*) *Flower v. Hartopp*, 6 Beav. 476.

(*t*) *Esdaile v. Stephenson*, 6 Mad. 366.

(*u*) *S. C.* as reported in Sug. 412.

(*w*) 6 Mad. 367; *Danl. Ch. Prac.* by H. 1169.

Ch. XVIII.

concur, not that a good title can be made upon payment of the incumbrance (*x*).

Report in favour of title, and no exception, decree for plaintiff unless new matter appear.

If the report be in favour of the title, and be not excepted to, a decree for specific performance will be made on the hearing on further directions, unless, in the interim, any matter appear which affects the title, in which case, although the report have been confirmed, a reference back to the Master will be ordered on motion (*y*).

Exceptions taken; causes should also be set down on further directions.

If exceptions are taken to the report in favour of the title, the cause should be set down for hearing on further directions at the same time with the exceptions (*z*), in order that, if the exceptions are allowed and the vendor do not request a reference back to the Master, the purchaser may at once take a decree (*a*): if, on hearing the exceptions, the Court considers the report erroneous, on the ground of a mistake by the Master as to the title which the purchaser can require (*b*), or as to the sufficiency of the evidence in support of the title (*c*), or as to the construction of an instrument (*d*), the title will, at the vendor's request, be again referred, in order that he may have an opportunity of removing the defect: it was held by Sir *J. Wigram*, V. C., in a recent case, that the reference back is not a matter of course, but depends on the vendor satisfying the Court that he has a fresh case to bring before the Master (*e*); but in a later case before Lord *Cottenham*, his Lordship laid down, as a general rule, that

If exceptions allowed, a fresh reference will be directed at vendor's request.

(*x*) See Sug. 419; *Magennis v. Fallon*, 2 Mol. 575.

(*y*) *Jeudwine v. Atcock*, 1 Mad. 597.

(*z*) Sug. 412.

(*a*) See V. C. Wigram's remarks in the judgment in *Daves v. Betts*, 12 Jur. 416.

(*b*) *Fildes v. Hooker*, 2 Mer.; see

p. 429.

(*c*) *Andrew v. Andrew*, 3 Sim. 390; *Curling v. Flight*, 2 Ph. 613.

(*d*) *Egerton v. Jones*, 3 Sim. 392, 409; 1 Russ. & M. 694; and see *Portman v. Mill*, *ibid.* 696.

(*e*) *Daves v. Betts*, 12 Jur. 412; the exceptions were overruled on appeal, 12 Jur. 709.

no special case need be made by the vendor, but that where the report is in favour of the title, and the Court holds a different opinion, and he desires an opportunity of making out a better title, the Court will deal with the report in the view that the Master has not fully performed the duty imposed on him, but has prematurely come to a conclusion in favour of the title, and will therefore send it back to him for further investigation; that there is no reason why the same practice should not prevail whether the original reference be made on motion or by decree; but that, in both cases, if the vendor wishes for an opportunity of making a better title, the Court should give him the option of doing so, and only conclude the matter when he says he can go no further (*f*). Upon the fresh reference, the purchaser seems not to be restricted to his original objections (*g*). Exceptions, it appears, should not be general, but should specify the objections to the title (*h*).

If the exceptions are allowed, and no reference back be asked by the vendor, his bill will be dismissed at the hearing; or, if the title be considered doubtful, the dismissal may be without giving judgment on the exceptions (*i*): but the purchaser if plaintiff may in general elect to take the defective title (*k*).

otherwise
bill is dis-
missed.

If all the exceptions are overruled, the purchaser cannot make other objections to the title (*l*), except, it is conceived, in the case of fresh matter, which affects the title, being discovered subsequently to the date of the Master's report (*m*).

Exceptions
overruled,
purchaser
how far pre-
cluded from
other objec-
tions.

(*f*) *Curling v. Flight*, 2 Ph. 616;
and see *S. C.*, 12 Jur. 423; and see
Daves v. Betts, on appeal, 12 Jur.
709.

(*g*) *Fildes v. Hooker*, 3 Mad. 193;
Sug. 411.

(*h*) *Flower v. Hartopp*, 6 Beav.
476.

(*i*) *Willcox v. Bellaers*, Turn. &
R. 491; *Robinson v. Milner*, 1 Ha.
578, n.

(*k*) *Infra*, 533.

(*l*) *Brooke v. Anon.* 4 Mad. 212.

(*m*) See *Jeudwine v. Alcock*, 1
Mad. 597.

Ch. XVIII.

Report
against title,
and no ex-
ceptions—
bill dis-
missed on
motion.

Exceptions
taken and
allowed—
reference
back when
directed.

If no ex-
ceptions,
decree will
be made on
hearing, if
vendor can

If the report be against the title and be not excepted to, the vendor's bill may be dismissed with costs on motion (*n*) : if exceptions are taken and are overruled, the Court, it appears, will at once discharge the purchaser, without motion (*o*).

If exceptions are taken to the report against the title, and are overruled, the Court will sometimes send the case back to the Master (*p*) ; but not, it is conceived, upon mere speculation, nor unless the vendor can satisfy the Court of the probability of the title being perfected (*q*) within a reasonable time (*r*) ; and long previous delay, of course, could be a reason for less additional time being allowed (*s*) ; “and the Court will not allow a seller to lie by, before the Master, and then upon further directions, attempt to make a title (*t*)” ; nor will it show any favour to a vendor, who, or whose solicitor, has improperly concealed a defect in the title (*u*) ; nor allow further time, when, owing to the long interval which has elapsed since the contract and the altered situation of the parties, substantial justice would not be done by decreeing specific performance (*w*).

So, if, no exceptions being taken, the cause comes on for further directions, or for original hearing if the reference (in a suit commenced by bill) were made before hearing,

(*n*) *Walters v. Pyman*, 19 Ves. 351 ; *Whitcomb v. Foley*, 6 Mad. 3.

(*o*) *Taylor v. Martindale*, 1 Y. & C. C. C. 658.

(*p*) See *Sidebotham v. Barrington*, 3 Beav. 524 ; 4 Beav. 110 ; 5 Beav. 261 ; and see *Fraser v. Wood*, 8 Beav. 342 ; *Smith v. Capron*, 13 Jur. 148, and *Chamberlain v. Lee*, 10 Sim. 444 ; the Master may, without any special order, receive further evidence in support of the title ; *Cottrell v. Watkins*, 1 Beav. 366 ; *Twyford v. Trail*, 3 Myl. & Cr. 645.

(*q*) See judgment of V. C. Wigram in *Daves v. Betts*, 13 Jur. p. 416.

(*r*) *Fraser v. Wood*, 8 Beav. 339 ; and see *Whittaker v. Whittaker*, cited 10 Ves. 599, and *Lechmere v. Brasier*, 2 Jac. & W. 289.

(*s*) See *Fraser v. Wood*, *supra*.

(*t*) *Esdaile v. Stephenson*, Sug. 412.

(*u*) *Dalby v. Pullen*, 1 Russ. & M. 296.

(*w*) See *Cowgill v. Lord Oxmantown*, 3 Y. & C. 369, 377.

and the vendor can satisfy the Court that he can remove the objection on which the Master reported against the title,—as where he can procure the concurrence of a party having an interest,—specific performance will be decreed without a reference back to the Master (*x*).

Ch. XVIII.

then remove objections;

So if, the report being against the title, and there being no exceptions, the purchaser moves that he may be discharged from the contract, the vendor may show that the title has been perfected subsequently to the report; *e. g.*, by a private Act of Parliament (*y*).

removal of objections, an answer to purchaser's motion to be discharged.

We have seen that, as a general rule, the purchaser may insist upon a reference as to title; and the Court will not tie him down to the objections raised upon the pleadings; he may, however, waive such *prima facie* right wholly or in part; and if he clearly rest his objection merely upon what Lord *Eldon* describes as “one neat dry point,” or, it is conceived, upon a plurality of neat dry points, the Court, being satisfied that no other question of title remains open, will make a decree without a prior reference (*z*): but he will not be compelled to take a defective title merely because, being plaintiff, he filed his bill with notice of the defect (*a*).

Purchaser's general right to reference of title—how it may be waived.

Where a purchaser was let into possession, and soon afterwards received the abstract and retained it for four years without objecting to the title, he was held to have waived his right to a reference (*b*); but in a later case it was held that, even after great delay and acquiescence (there being no express waiver), the Court will not compel the purchaser to complete if the title is manifestly bad (*c*).

By acquiescence.

Purchaser after great delay not forced to take clearly bad title.

(*x*) *Paton v. Rogers*, 6 Mad. 256; 272.
Dawes v. Betts, 12 Jur. 416.

(*b*) *Fleetwood v. Green*, 15 Ves. 594; and see *Margravine of Anspach v. Noel*, 1 Mad. 310.

(*y*) *Coffin v. Cooper*, 14 Ves. 205.
 (*z*) See *Jenkins v. Hiles*, 6 Ves. 653, 654, and V. C. Wigram's remarks in *Lucas v. James*, 7 Ha. 425.

(*c*) *Blachford v. Kirkpatrick*, 6 Beav. 232; and see *Warren v. Richardson*, You. 1.

(*a*) *Stapylton v. Scott*, 16 Ves.

Ch. XVIII.

Decree for
specific per-
formance—
its form.

According to the old practice, there were two ways of framing a decree in a suit for specific performance: the one was to declare that the plaintiff was entitled to a specific performance if a good title could be shown, and then to direct a reference as to the title; the other, to refer the title to the Master, and to follow up that direction by a declaration that if a good title was shown the agreement ought to be specifically performed (*d*). The mere direction of the reference, seems, however, to be an implied declaration of the right to specific performance (*e*): so that, on the hearing on further directions, the Court will not enter upon any other defence set up by the answer (*f*); and such a declaration seems to have been at one time not unfrequently omitted (*g*). The present practice, however, in suits commenced by bill, and where, by reason of the contract itself having been disputed, the cause is heard before a reference to the Master, seems to be, to declare absolutely that the plaintiff is entitled to a specific performance of the agreement, and to refer it to the Master to inquire whether a good title can be made; not to declare that the plaintiff is entitled, &c., *if* a good title can be made (*h*): and, in such a case, the Court, in directing a reference, will not direct an inquiry as to when the title was first shown (*i*). We have already noticed the form of the order of reference which, in a suit commenced by claim, takes the place of the decree for specific performance on the original hearing (*k*).

Plaintiff
may take a
decree,
adopting
parol va-
riation

Where the agreement was in writing, and a parol variation, not set up by the answer, came out on the cross-examination of the defendant's agent, who was one of the

(*d*) *Per* Lord Eldon in *Stevens v. Guppy*, 3 Russ. p. 182.

(*e*) See *Mole v. Smith*, Jac. 495.

(*f*) *Le Grand v. Whitehead*, 1 Russ. 309.

(*g*) See Seton on Decrees, 210.

(*h*) *Clive v. Beaumont*, 1 De G. & S., see p. 408; *Gibbins v. North Eastern Metropolitan Asylum*, 11 Beav. see p. 5.

(*i*) *S. C.*

(*k*) *Supra*, p. 522.

plaintiff's witnesses, the Court seemed to consider that this was a proper subject for inquiry before finally disposing of the case; but, on the plaintiff consenting to adopt the parol variation as part of the contract, specific performance was at once decreed with costs (*l*).

Ch. XVIII.

proved by
defendant's
agent.

The purchaser, it appears, may elect to take a defective title (*m*): "the covenants being so framed as not to leave the seller exposed to an action on account of the flaw: but where the conveyance would be merely void, and might embarrass persons claiming under the same title as the seller," the purchaser seems to have no such right (*n*).

May elect to
take de-
fective title.

We may here remark, that a decree for specific performance, in a suit between vendor and purchaser, is no protection against the adverse claims of persons not parties to the suit (*o*): except so far as that, if any particular question of title be decided in favour of the vendor, such decision forms a precedent which would probably be followed on a future occasion.

Decree for
specific per-
formance,
no bar to
claims by
persons not
parties.

Where the plaintiff in his bill offered to perform an ambiguous agreement, "according to the true intent and meaning thereof," but uniformly up to the hearing insisted on his own construction, as the only contract between himself and the defendants, not offering to take up the other construction which the defendants were at one time willing to perform, Sir *T. Plumer* held the case to be perfectly different from one where the plaintiff calls upon the Court to declare the true construction, submitting to perform according to the same; and, his opinion being against the plaintiff's construction, he refused to enforce specific performance against the defendants according to the construction contended for by their answer (*p*).

Plaintiff not
allowed to
take decree
according
to that con-
struction of
agreement
which he
had re-
pudiated.

(*l*) *London and Birmingham Rail-
way Company v. Winter*, Cr. & Ph.
57.

(*n*) Sug. 420.

(*o*) See *Wood v. White*, 4 Myl. &
C. p. 470.

(*m*) *Bennett v. Fowler*, 2 Beav.
302.

(*p*) *Clowes v. Higginson*, 1 Ves. &
B., see p. 535.

Ch. XVIII.

Defendant may take decree with parol variations of written contract offered by purchaser's bill.

Parol variation proved by defendant—no decree for plaintiff; but defendant may take decree without cross bill.

Decree should direct accounts. &c.

And where the plaintiff by his bill, praying the performance of a written agreement, offers to the defendant the benefit of certain subsequent parol variations, the Court will decree specific performance with the variations, if the defendant elect to take advantage of them; or otherwise of the original agreement (*q*).

So, where the plaintiff by his bill offers to perform the agreement (*r*), and the defendant proves a parol variation, the Court will, at his request, without a cross bill, decree specific performance with the variation, and even fix the plaintiff with the costs (*s*).

The decree should also, (unless the particular circumstances of the case render such a direction unnecessary,) direct the usual accounts to be taken of the rents and profits of the estate, and of interest on the purchase-money, and should order payment of the balance due from the purchaser, and the execution of the conveyance and delivery of the deeds by the vendor (*t*): and an account may be decreed on the footing of the agreement; although, as in the case of a lease, the subject-matter of the contract has expired by lapse of time before the hearing (*u*).

Where part of the subject-matter of the contract is abstracted by the vendor, *pendente lite*, Equity will give relief, even upon supplemental bill after a decree for specific performance; and, in order to assess the amount of damages, will allow the plaintiff to bring an action to ascertain *quantum damnificatus*, and require the defendant to admit the necessary facts (*w*).

Decree in vendor's

If, on a bill filed by the vendor, the purchaser be

(*q*) *Robinson v. Page*, 3 Russ. 114.

(*r*) 1 C. P. Coop. N. R. 353.

(*s*) *Fife v. Clayton*, 13 Ves. 546; S. C., 1 C. P. Coop. N. R. 351; *Gwynn v. Lethbridge*, 14 Ves. 585; see *Higginson v. Clowes*, 15 Ves. 525.

(*t*) See Seton on Decrees, 212, 214.

(*u*) *Wilkinson v. Torkington*, 2 Y. & C., Ex. 726.

(*w*) *Nelson v. Bridges*, 2 Beav. 239, 244.

considered unable to pay what is due in respect of purchase-money, interest and costs, the decree may direct that, in default of payment, the Master do proceed to a sale of the premises for the purpose of satisfying the amount so due; and that the deficiency, if any, be paid by the purchaser (*x*): and the vendor can prove as a specialty creditor (*y*) in respect of such deficiency (*z*) in a suit instituted for the administration of the assets of the purchaser; the amount to be found due upon the reference to the Master constituting a judgment debt within the 1 & 2 Vict. c. 110, s. 13 (*a*).

Ch. XVIII.

suit, may direct a resale, and payment of the deficiency by purchaser.

The usual direction as to the conveyance is that the Master settle it "if the parties differ about the same" (*b*): these latter words will, however, it seems, be omitted, if an infant is a necessary party to the conveyance (*c*); or if it will, by Statute, operate to convey the infant's estate although he may not actually be a party (*d*); but not merely on the ground of his being interested in the estate, as in the case of an infant *cestui que trust* whose trustees have power to sell and give receipts (*e*). In one case the decree went on to direct that the Master, in settling the conveyance, should insert therein a particular clause in favour of the plaintiff (*f*); but it does not appear that the Court will, in general, embarrass the Master with any positive direction, or declaration as to the rights of the parties (*g*): if the decree omit the usual direction as to the conveyance, the omission may be supplied on petition (*h*).

As to conveyance being settled by Master.

(*x*) See *Haydon v. Bell*, 1 Beav. 267.

337, 343; *Rome v. Young*, 3 Y. & C.

199; *Duke of Beaufort v. Phillips*,

1 De G. & S. 321.

(*y*) *S. C.*

(*z*) *Rome v. Young*, 4 Y. & C. 204.

(*a*) *Duke of Beaufort v. Phillips*,

1 De G. & S. 321.

(*b*) *Seton on Decrees*, 212.

(*c*) *Calvert v. Godfrey*, 2 Beav.

(*d*) *Cheese v. Cheese*, 15 L. J., N. S., Ch. 28.

(*e*) *Richardson v. Ward*, 11 Beav. 378.

(*f*) *Blakesley v. Whieldon*, 1 Ha.

183.

(*g*) *Williams v. Teale*, 6 Ha. 254.

(*h*) *Trevelyan v. Charter*, 9 Beav.

140.

Ch. XVIII.

Course of
proceeding
in Master's
office.

If the matter comes before the Master, the practice, as settled by the 76th Order of April, 1828 (*i*), is, for the party entitled to prepare the conveyance to bring the draft thereof into the Master's office, and give notice of his having so done to the other party; and, at any time within eight days after such notice, such other party may inspect the same without fee, and may take a copy thereof if he thinks fit; and at or before the expiration of the eight days, or such further time as the Master shall in his discretion allow, such other party must either agree to adopt the conveyance, or signify his dissent therefrom, and thereupon he may deliver a statement in writing of the alterations which he proposes in the draft of the conveyance. But if he deliver no such statement in writing, or if the party bringing in the draft refuse to adopt the proposed alterations, the Master proceeds to settle the conveyance, according to the practice of the Court. And in case the Master adopts the proposed alterations, the costs of the proceeding are borne by the party preparing the draft.

Draft laid
before
counsel.

The usual course is, for the Master to take the opinion of some conveyancing counsel upon the draft conveyance and objections, as in the case of an abstract (*k*).

Effect of
appeal.

If an appeal is pending, the Master must nevertheless proceed to settle the conveyance, and only its execution will be stayed (*l*).

Engross-
ment of
draft, and
allowance
thereof by
Master.

The draft, when settled by the Master, is engrossed in his office, and, according to the books of practice, "he signifies his allowance of it by signing his name in the first and last skins, in the following form, in the margin of the indenture; A. v. B. I approve of and allow this

(*i*) See Edwards' Orders, 27, and Atk. 264, 266.
Daniel's Ch. Prac. by H. 1191.

(*l*) *Gwynn v. Lethbridge*, 14 Ves.

(*k*) *Supra*, p. 523; Dan. Ch. Prac. 585.
by H. 1191; see *Lord v. Griffith*, 3

Indenture, being the same mentioned in my report dated Ch. XVIII.
the day of . He then signs a report or certificate of his having approved and allowed the engrossment, which must be filed in the usual way (*m*):” but upon this, as on other points, the practice of the several Masters is believed not to be uniform.

Exceptions lie to the Master’s certificate (*n*) ; but if no exceptions are filed the conveyance must be executed by the parties (*o*). Exceptions to Master’s certificate.

In various cases of necessary parties being under disabilities, a conveyance might, until recently, have been procured under the 1 Will. IV. c. 60, and 4 & 5 Will. IV. c. 23 (*p*) ; and may now be procured under the 13 & 14 Vict. c. 60, the principal provisions of which (*q*) we have already noticed (*r*). Conveyance under the Trustee Act, 1850.

And by the 1 Will. IV. c. 65 (*s*), when any person having contracted to sell any land becomes lunatic, and a specific performance of the contract, either wholly or as the same remains to be performed, has been decreed either before or after the lunacy, the committee of the estate of the lunatic, may, in his place, by direction of the Lord Chancellor, signified by an order to be made on the petition of the plaintiff or any of the plaintiffs in the suit, convey the land in pursuance of the decree, to such person and in such manner as the Chancellor shall direct ; and the purchase-money, or so much thereof as remains unpaid, is to be paid to the Committee (*t*). Conveyance under 1 Will. 4, c. 65, in case of lunatic vendor.

Two modes of proceeding might, until recently, have been adopted when a party refused upon order to execute Conveyance how to be obtained when party

(*m*) Dan. Ch. Prac. by H. 1192, citing 1 Turn. & V. 422.

(*n*) *Wakeman v. Duchess of Rutland*, 3 Ves. 504.

(*o*) 1 Dan. Ch. Prac. by H. 1192.

(*p*) See *In re Lowe’s estate*, 2 Ph. 690 ; and on the Acts generally, see

Hill on Trustees, 275, *et seq.*

(*q*) See, in particular, sect. 30, *supra*, 280.

(*r*) *Supra*, 277, *et seq.*

(*s*) Which is not repealed by the 13 & 14 Vict. c. 60.

(*t*) Sect. 27.

Ch. XVIII.

refuses to
convey.

the necessary assurance : the first under the 1 Will. IV. c. 36 (*u*) which authorized the Court to appoint one of the Masters to execute the conveyance ; but only when the recusant party had been in prison for two months (*w*) ; or, secondly, the party ordered to convey might, upon his refusal or default for twenty-eight days after tender of the conveyance, be treated as a trustee, and a conveyance might be obtained under the 1 Will. IV. c. 60, s. 8 (*x*) : the new Trustee Act, repealing the 1 Will. IV. c. 60, contains, as we have seen, an express provision authorizing the Court to declare that any of the parties to a suit for specific performance are trustees within the meaning of the Act, and to make a similar declaration as respects unborn persons in certain cases (*y*) ; and will probably, in cases coming within its provisions, supersede, although it does not repeal, the 1 Will. IV. c. 36.

Interest on
money re-
funded on
appeal, not
generally
allowed.

We may here remark that where money has been paid under a decree or order, which is reversed on appeal, interest will not be allowed except by special direction (*z*).

Decree dis-
missing
vendor's
bill—return
of deposit
when
ordered.

Where the vendor's bill is dismissed for want of title, the Court will direct him, if he has received the deposit, to repay it with interest (*a*) : or, if in the hands of the auctioneer, would probably direct the vendor to concur with the purchaser in an order for its payment (*b*) : but, in a recent case, where the vendor's bill was dismissed on the ground of laches, and without any decision on the question of title, Sir *J. Wigram*, V. C., refused to order the return of the deposit ; and intimated that such an order should only be made in cases where the decree dismissing the

(*u*) See sect. 15, rule 15.

and see 3 Y. & C. 131.

(*w*) See 9 Beav. 275.

(*a*) *Hayes v. Bailey*, cited Sug.

(*x*) See *Warburton v. Vaughan*, 4 Y.

814 ; *Lord Anson v. Hodges*, 5 Sim.

& C., Ex. 247 ; *Thomas v. Gwynne*,

227.

9 Beav. 275.

(*b*) *Bryant v. Busk*, 4 Russ., see

(*y*) 13 & 14 Vict. c. 60, s. 30.

p. 6.

(*z*) *Parker v. Morrell*, 2 Ph. 469 ;

bill would entitle the purchaser to an injunction if the vendor attempted to enforce his legal remedies upon the contract (*c*): the return of the deposit cannot (*d*) be ordered when the purchaser's bill is dismissed; but, in a recent case, *V. C. K. Bruce*, in adhering to the rule, refused the vendor costs, on his declining to return the deposit (*e*).

If a bill is dismissed on grounds which would not in themselves be a defence to an action at Law, it does not appear to be necessary to express in the decree that the dismissal is without prejudice to the legal remedy (*f*).

(11.) *As to costs.*

In Equity, as at Law, the party who fails is, *primâ facie*, liable to costs (*g*): and, although the question of costs rests entirely in the discretion of the Court (*h*), yet it is for the unsuccessful litigant to show, (if he can,) the existence of circumstances sufficient to negative his *primâ facie* liability (*i*); and the present disposition of the Courts appears to be, to adhere, with considerable strictness, to the general rule. It was observed by Lord *Cottenham*, C., in a recent case, "Parties may have more or less reason for coming here; but the question is, whether those who are right, or those who are wrong, are to pay the costs of their so doing. The rule I always act upon is, to order costs to be paid by those who are wrong" (*k*):

Costs, as a general rule, are borne by unsuccessful litigant.

(*c*) *Southcomb v. Bishop of Exeter*, 463.

Ha., see p. 225.

(*d*) *Supra*, 88.

(*e*) *Gee v. Pearse*, 2 De G. & S., see 346.

(*f*) See *Wedgwood v. Adams*, 8 Beav. 105.

(*g*) *Vancouver v. Bliss*, 11 Ves., see

(*h*) Sug. 821; *Gerahty v. Malone*, 1 H. L. C. 81.

(*i*) *Vancouver v. Bliss*, *ubi supra*.

(*k*) *Hunter v. Nockolds*, 2 Ph. 545; and see *Green v. Briggs*, 6 Ha. 633, and *Earl Nelson v. Lord Bridport*, 10 Beav. 305.

Ch. XVIII.

The cases upon the subject may be conveniently classified as follows, viz.

1st, Cases where the general rule, fixing the unsuccessful litigant with costs, is merely allowed to operate.

2ndly, Cases where it is enforced with more than ordinary stringency.

3rdly, Cases where it is modified, so as to deprive the successful litigant of his costs, wholly or in part.

And 4thly, Cases where the successful litigant is wholly or in part fixed with payment of costs.

Cases where
general rule
is allowed
to operate.

As to the 1st class of cases.—A purchaser resisting specific performance, on grounds which the Court considers clearly untenable, will not be relieved from costs because he acted under counsel's opinion (*l*) ; or even upon the recommendation of the Master (*m*) : so where he is held by his conduct to have waived the usual reference upon the title (*n*), or any particular objection arising on the title (*o*), and he has rested his defence on the question of title, the decree against him will be with costs. So, where the vendor's bill is dismissed merely for want of title, and the title is clearly bad, the decree against him is with costs (*p*), although he be merely a trustee for sale (*q*), or although the title have become defective through the accidental destruction of the deeds subsequently to the contract (*r*) : so, where a purchaser had objected that a good title could not be shown unless certain accounts were taken, and, this being resisted, each party filed a bill for specific

(*l*) *Maling v. Hill*, 1 Cox, 186; and see *Firmin v. Pullin*, 12 Jur. 410, where it would appear that a trustee acting under advice was nevertheless fixed with costs.

(*m*) *Earl Nelson v. Lord Bridport*, 10 Beav. 305.

(*n*) *Fleetwood v. Green*, 15 Ves. 595; *Margravine of Anspach v.*

Noel, 1 Madd. 317.

(*o*) *Burnell v. Brown*, 1 J. & W. 175.

(*p*) *Walters v. Pyman*, 19 Ves. 351.

(*q*) *Edward v. Harvey*, G. Coop. 40.

(*r*) *Bryant v. Busk*, 4 Russ. 1, 5.

performance, the Court, holding the purchaser to be right, made a decree in the second suit, and gave him the costs of both suits (*s*).

As to the 2nd class of cases.—A vendor obtaining a decree for specific performance has been held entitled to costs on the special ground of the purchaser having persisted in an objection to the title which he knew had been decided against another purchaser in a former suit (*t*) ; so, where a bill is dismissed on the ground of misrepresentation (*u*), or fraud, or contains groundless imputations of moral (*w*) fraud against the defendant (*x*), or where the claim is dishonourable and contrary to moral equity (*y*), or against a clear stipulation in the contract (*z*), the dismissal will be with costs: so, where the unsuccessful litigant has acted fraudulently in the subject-matter of the suit, or has acted vexatiously, and refused fair offers of accommodation, the decree against him will generally be with costs (*a*).

Cases where general rule is enforced with more than ordinary stringency.

As to the 3rd class of cases (*b*).—A vendor obtaining a decree, has been refused costs on the ground of his having unsuccessfully contended that the purchaser had waived his right to investigate the title (*c*) ; so, a vendor has been refused costs, where the purchaser's objection to the title, although overruled, has been considered a fair objection (*d*), or has been occasioned by the vendor or his

Cases where general rule is modified, so as to deprive unsuccessful litigant of costs, wholly or in part.

(*s*) *Burton v. Todd*, and *Todd v. Gee*, 1 Sw. 255, 262.

(*t*) *Biscoe v. Wilks*, 3 Mer. 456.

(*u*) *Buxton v. Lister*, 3 Atk., see 387.

(*w*) See the conclusion of V. C. Wigram's judgment in *Marshall v. Sladden*, 7 Ha. 444.

(*x*) Beames on Costs, 109 ; *Scott v. Dunbar*, 1 Moll. 442, 460 ; *Langley v. Fisher*, 9 Beav. 90 ; see *Glascott v. Lang*, 2 Ph. 310, 322 ; *Knight v. Majoribanks*, 2 Mac. & G. 16.

(*y*) *Davis v. Symonds*, 1 Cox, 402, 408, and other cases cited in Beames on Costs, 37.

(*z*) *Williams v. Edwards*, 2 Sim. 78, 83.

(*a*) Beames on Costs, 109, and cases cited.

(*b*) *Ibid.* 39.

(*c*) *M'Queen v. Farquhar*, 11 Ves. 482 ; *Sidebotham v. Barrington*, 5 Beav. 261.

(*d*) *Cox v. Chamberlain*, 4 Ves. 631 ; *Staines v. Morris*, 1 Ves. & B.

Ch. XVIII. solicitor (*e*) : so, where the title was not clear on the abstract as delivered before bill filed (*f*), or the vendor has refused to furnish necessary evidence in support of the title, (although the purchaser's requisitions embraced unnecessary evidence) (*g*).

So, the dismissal of the vendor's bill has been without costs, in cases where the dismissal was merely on the ground of his own *laches* in applying to the Court (*h*), or of the title being merely doubtful (*i*), or of the general inaccuracy of the transactions relied on as constituting the contract (*k*), or upon a ground of defence which the purchaser did not resort to until after the institution of the suit (*l*) : so, where a purchaser had, in the first instance, by his acts, waived the time for completion, and had gone on for some time inducing the vendor to incur expenses to perfect his title, and suddenly, upon discovering that vacant possession could not be given according to stipulation, declined to complete (*m*) : so, according to Sir *E. Sugden*, "if, after a bill filed for specific performance, the plaintiff, in pursuance of a power in the instrument, determines the contract, the bill will be dismissed without costs" (*n*) : so, the Court has, by way of compromise, refused to fix the vendor with costs, he on his part consenting to give up his legal right of action under the agreement (*o*).

8 ; *Aistabie v. Rice*, 3 Madd. see 261 ;
Thorpe v. Freer, 4 Madd. 466.

(*e*) See *Fenton v. Browne*, 14 Ves.
144, 150 ; *Dakin v. Cope*, 2 Russ. 175.

(*f*) *Anon. v. Collinge*, 3 Ves. & B.
143, n. ; *Wilson v. Clapham*, 1 Jac.
& W. 36.

(*g*) *Newall v. Smith*, 1 Jac. & W.
263.

(*h*) *Guest v. Homfray*, 5 Ves. 824.

(*i*) *White v. Foljambe*, 11 Ves.
337, 352 ; *Willcox v. Bellaers*, Turn.
& Russ. 491.

(*k*) *Marquis Townshend v. Stan-*
groom, 6 Ves. see 341.

(*l*) *Winch v. Winchester*, 1 Ves. &
B. 380 ; and see 3 Y. & C. 517.

(*m*) *Nokes v. Lord Kilmorey*, 1 De
G. & S. 444 ; and see *Deverell v.*
Lord Bollon, 18 Ves. 505, 514 ; *supra*,
p. 203.

(*n*) Sug. 661, referring to *Western*
v. Perrin, 3 Ves & B. 197.

(*o*) *Buxton v. Lister*, 3 Atk. 387 ;
and see 2 De G. & S. 346.

So, a purchaser obtaining a decree for specific performance, has been refused his costs, on the ground of the inadequacy of the consideration (*p*): so, where a purchaser's bill for the performance of a contract alleged to arise out of correspondence, was dismissed on the ground of the language being equivocal and not clearly amounting to an agreement, costs were refused (*q*): so, also, on the ground of the defendant having in his answer alleged fraud and circumvention, which he failed to prove (*r*), or having set up a false defence which the plaintiff has been obliged to disprove (*s*): so, if the purchaser elect to have his bill dismissed, upon its appearing that the vendor cannot make a title, the present practice seems to be to dismiss the bill without costs (*t*); unless, perhaps (*u*), his bill alleges that the vendor cannot make a title (*w*).

And it has been held that, if a bill is correctly filed on the authority of a reported decision, there being no authorities in conflict with it, and such decision is reversed, the plaintiff may thereupon, on motion, dismiss his bill without costs (*x*).

As to the 4th class of cases.—It not unfrequently happens that the party obtaining a decree has been clearly in the wrong, during all or a part only of the litigation; and if so, he must, as a general rule, pay all or a proportionate part (*y*) of the costs of the suit: *e. g.*, in an exceptional case, where the plaintiff obtained a decree not in accordance with the prayer of his bill (*z*), he was made to pay the costs of the suit; so, “if a purchaser file

Cases where, in contravention of general rule, successful litigant is made to pay costs.

(*p*) *Burrowes v. Lock*, 10 Ves. 470.

(*q*) *Stratford v. Bosworth*, 2 Ves. & B. 348; and see 6 Ves. 341.

(*r*) *Thomas v. Phillipps*, 11 Jur. 80, V. C. K. B.

(*s*) *Field v. Churchill*, 4 Jur. 739, C.

(*t*) *Malden v. Fyson*, 9 Beav. 347.

(*u*) See Sug. 822, n. (*e*).

(*w*) *Nicloson v. Wordsworth*, 2 Sw. 365.

(*x*) *Robinson v. Rosher*, 1 Y. & C. C. 7; see also, as to mutual mistake, *Broughton v. Lashmar*, 5 Myl. & Cr. 136.

(*y*) See *Farrow v. Rees*, 4 Beav. 25.

(*z*) *Mortimer v. Orchard*, 2 Ves. jun. 243.

Ch. XVIII. a bill insisting that the vendor cannot make a title, he must pay the costs, whether he accept or refuse the title" (a) : so, if a purchaser, being a plaintiff and aware of objections to the title, require a reference to the Master, and, on the Master reporting against the title, agree to waive the objections, he must pay the costs of the unnecessary investigation (b) : so if, prior to the filing of the vendor's bill, the contract was resisted merely on the ground of want of title, and no title was shown before bill filed, the plaintiff, although he obtained a decree, will have to pay the costs up to the time when he showed a title (c) ; and this, although the purchaser, by his answer, unsuccessfully insist on the alleged illegality or abandonment of the contract (d) ; or even the general costs of the suit (e), except such costs as have been occasioned by improper contentions or objections made or taken by the defendant in the course of the suit (f) : so, where a vendor, when before the Master, abandoned the ground on which he had previously relied, but established his title on another ground, and the Master reported generally in favour of the title, the purchaser was allowed the costs of the reference and the several applications to the Court (g). But the rule will not prevail where the purchaser, by resisting the contract on grounds other than of title (h), or by his improper conduct (i), or claim (k), has occasioned

(a) Sug. 822, citing *Nielson v. Wordsworth*, 2 Sw. 365, but with a query.

(b) *Bennett v. Fowler*, 2 Beav. 302.

(c) *Wilson v. Allen*, 1 Jac. & W. 623 ; Sug. 826.

(d) *Smith v. Leigh*, Sug. 824 ; but the purchaser will not be allowed the extra costs occasioned by this unsuccessful defence, *S. C.*

(e) *Knight v. Harden*, Beames on Costs, 38 ; *Townsend v. Champernowne*, 3 Y. & Coll. 528.

(f) *S. C.*

(g) *Fielder v. Higginson*, 3 Vcs. & B. 142 ; *Harrison v. Coppard*, 2 Cox, 318.

(h) *Croome v. Lediard*, 2 Myl. & K. 293 ; *Scoones v. Morrell*, 1 Beav. 251 ; *Taylor v. Brown*, 2 Beav. 180 ; but see Sug. 823.

(i) *Oxenden v. Lord Falmouth*, cited Sug. 826.

(k) *Wyrill v. Bishop of Exeter*, 1 Price, 292.

the litigation; or where, insisting on other objections, he has not accepted the vendor's offer to procure evidence which, if produced, would have perfected the title (*l*): so, if a purchaser file a bill for specific performance with an abatement of purchase-money, the question of abatement being the only one in dispute, if he fail upon this point the decree for specific performance will give costs against him (*m*): so, if the successful litigant introduce upon the pleadings unfounded allegations affecting the character (*n*) of his opponent, he will have to pay the costs thereby occasioned (*o*). But where the Court, merely on the ground of the personal hardship of the case as against the defendant, refuses to enforce specific performance, and dismisses the bill, it will not make him pay the plaintiff's costs (*p*).

Where a purchaser sets up a defence which prevents the plaintiff from obtaining the usual reference of title on motion, and fails to establish it, he may be at once directed to pay costs up to and inclusive of the hearing, without regard to the result of the reference (*q*).

Where the defendant submits to the whole demand of the plaintiff, and to pay costs, he may at once stop all further proceedings (*r*); and, if the question of liability to costs be the only one remaining in dispute, the proper course, it appears, is, to apply to the Court by petition (*s*): and where a plaintiff omitted so to do, but brought the

Costs, when defendant submits to plaintiff's demand.

(*l*) *Long v. Collier*, 4 Russ. 269.

(*m*) *Fewster v. Turner*, 6 Jur. 144, V. C. W.; *White v. Cuddon*, 8 Cl. & Fin. 766.

(*n*) See 7 Ha. 444.

(*o*) *Wright v. Howard*, 1 Sim. & St. see 205; *Bower v. Cooper*, 2 Ha. 408; see *Thomas v. Phillips*, 11 Jur. 80, V. C. K. B.

(*p*) *Wedgwood v. Adams*, 8 Beav. 103.

(*q*) *Hyde v. Dallaway*, 4 Beav. 606.

(*r*) *Damer v. Earl of Portarlington*, 2 Ph. 30; *Sivell v. Abraham*, 8 Beav. 598, and cases there cited; *Sawyer v. Mills*, 1 Mac. & G. 390.

(*s*) *Sivell v. Abraham*, *ubi supra*; *Winter v. Vizitelli*, 36 Leg. Ob. 53, V. C. E.; *Price v. Corporation of Penzance*, 4 Ha. 506.

Ch. XVIII.

cause to a hearing, the Court refused him any costs subsequent to the time at which his original demand had been submitted to (*t*). It has, however, been unwillingly held by V. C. K. Bruce, that this course cannot, without the defendant's consent, be adopted before answer; inasmuch as he has a right to put in his answer, and read it on the question of costs at the hearing (*u*): and in a later case (*w*) his Honour refused a similar application by a plaintiff after answer; but merely on the ground of the novelty of the proceeding.

When defendant dis-
claiming is
entitled to
costs.

In a late case (*x*), it was laid down by Sir J. Wigram, V. C., as a general rule, that where a defendant so disclaims as to show that he had no interest in the property *when the bill was filed*, he is entitled to his costs (*y*): but where he is properly brought before the Court in respect of an interest at the *time the bill was filed*, and then says, "I now abandon my interest," it is a question of discretion with the Court either to order the plaintiff to pay the defendant's costs or not; with reference to the circumstances which may have rendered the suit necessary or proper (*z*).

Possession
—how far
important.

As a general rule, a purchaser is less favoured on the question of costs when he has taken possession of the estate before the title is made out: but this does not apply to cases where, according to the contract, possession is to be taken before a title is shown; or where it is taken at the instance of the vendor (*a*). A purchaser who, for many years, retained possession without payment, and

(*t*) *Sivell v. Abraham*, 8 Beav. 598; 956.

and see *Sentance v. Porter*, 13 Jur.

980, V. C. W.; and *Woodward v.*

Miller, 16 L. J., N. S., V. C. K. B.

16.

(*u*) *Langham v. Great Northern*

Railway Company, 1 De G. & S. 505.

(*w*) *McNaughten v. Hasker*, 12 Jur.

(*x*) *Gabriel v. Sturgis*, 5 Ha. 101.

(*y*) See *Glover v. Rogers*, 11 Jur.

1000, R.

(*z*) See *Ohrly v. Jenkins*, 11 Jur.

1001, V. C. K. B.

(*a*) See *Vancouver v. Bliss*, 11

Ves. 458; see 464.

refused either to vacate the contract or accept the title, Ch. XVIII. was fixed with the costs of a suit by the vendor, although the title was ascertained to be defective (*b*).

Where the Court has actually dismissed a purchaser's bill with costs, it will not, on a subsequent application, allow him to set off against them the deposit paid to the vendor, but will leave him to his legal right (*c*) : but the Court, as we have seen, has refused to give costs unless the vendor would return the deposit (*d*).

Deposit, not
set off
against
costs.

Where a defendant a purchaser asked for a case to be sent to a Court of Law, which was granted, and the opinion of the Judges was against him, but ultimately the bill was dismissed with costs upon another ground, he was allowed his costs at Law as well as in Equity (*e*) : but, in other cases, the costs of, what may be termed, collateral litigation, have either been refused, or have been thrown upon the party failing therein, although held entitled to the general costs of the suit (*f*). It would appear that, as a general rule, such costs are not included in a mere order for payment of the costs of the suit (*g*).

Costs of case
sent to Law.

And it is laid down by Sir *E. Sugden*, as a general rule, "that either party resorting to Law, where the Equity is against him, will be fixed with the costs of the action" (*h*) ; but the *prima facie* right of the other party to such costs may be lost by his neglecting to resort to Equity so soon as the action is commenced at Law (*i*).

Costs of
action at
Law.

(*b*) *King v. King*, 1 Myl. & K. 442.

downe, 3 Y. & Col. see 528 ; *Smith*

(*c*) *Williams v. Edwards*, 2 Sim. 84.

v. Leigh, V. C. 1821, cited Sug. 824.

(*d*) *Gee v. Pearse*, 2 De G. & S. 346.

(*g*) *Salkeld v. Johnston*, 1 Mac. & G. 533.

(*e*) *Forbes v. Peacock*, 12 Sim. 528 ; the Vice-Chancellor's decision on the general merits was reversed by Lord Lyndhurst, 1 Ph. 717.

(*h*) Sug. 829 ; *Staines v. Morris*, 1 Ves. & B. 16.

(*i*) *Grover v. Hugell*, 3 Russ. see 433.

(*f*) See *Townsend v. Champer-*

Ch. XVIII.

No interest
payable on
costs re-
funded.

Lastly, we may remark, that where either party has received costs under an order or decree which is subsequently reversed on appeal, he will not, in repaying such costs, be compelled to pay interest upon them (*k*).

(*k*) *Small v. Attwood*, 3 Y. & C. 131 ; and see 2 Ph. 469.

CHAPTER XIX.

Chap. XIX.

AS TO SALES BY THE COURT OF CHANCERY.

1. *As to the time for, conduct of, and manner of the sale.*

2. *As to the rights and liabilities of the highest bidder, after the sale but before confirmation of the Master's report ;—and as to opening biddings.*

3. *As to confirming the Master's report ;—and as to the purchaser's rights and liabilities after confirmation.*

4. *As to the investigation of title ;—payment and application of purchase-money ;—possession ;—and preparation and execution of the conveyance.*

5. *As to the purchaser's rights after completion.*

6. *As to the practice where the purchaser fails to complete.*

(1.) An estate when sold by the Court is usually sold by public auction ; the Court will, however, at once accept an advantageous offer actually made for the property (a) ; or, if circumstances render such a course expedient, will authorize the Master generally to sell by private contract (b).

Sales by the Court are usually by auction, but may be by private contract.

Where the decree in an administration suit directs the Master to inquire and state what real estate passed by the will, and that the estates which he shall find to have passed be sold with his approbation, he may, after having

When sale may be made in administration suit.

(a) See *Dowle v. Lucy*, 4 Ha. 311.

The Master's report approving of such a sale should be confirmed on

special petition ; *Bailey v. Todd*, 1 Beav. 95.

(b) See *Dan. Ch. P.* by H. 1216.

Chap. XIX. informed himself what estates passed, proceed to sell them, without making any previous report upon the preliminary inquiry (c) : but where an infant is interested in the real estate, it seems doubtful whether the Court will direct a sale until the accounts have been taken and the cause has been heard on further directions (d).

Sale may be made under 3 & 4 Will. IV. c. 104, in suit by person claiming under will.

It has recently been determined, by V. C. *Shadwell* and V. C. *K. Bruce*, that the Court may sell the real estate of a testator for payment of his debts under the 3 & 4 Will. IV. c. 104, although the suit be instituted by a person interested under the will instead of by a creditor (e).

Sale in suits commenced by claim.

With respect to suits commenced by claim, under the Orders of April 1850, it is directed (f), that "under every Order whereby any property is to be sold with the approbation of the Master, the same is to be sold to the best purchaser that can be got for the same, to be allowed by the Master; *wherein* (g) all proper parties are to join as the Master shall direct."

Who may bid.

As a general rule, no party to the suit ought to bid for the estate without the previous permission of the Court (h) ; and the party permitted to bid will not be allowed to conduct the sale (i) ; and where, without such permission, the party conducting the sale purchased, and under a feigned name, the Court, even after the purchase had been confirmed, ordered the estate to be put up again at the price for which he had bought it ; and if there should be no higher bidding, he was to be held to his bargain (k).

(c) *Dykes v. Taylor*, 16 Sim. 563.

(d) See *Baillie v. Jackson*, 10 Sim. 167, where Sir L. Shadwell, V. C., refused to insert a direction for sale in the decree ; but, in Sir E. Sugden's opinion, there is no invariable rule upon the subject ; see *Lyuch v. Joyce*, 3 Dru. & W. 349.

(e) *Price v. Price*, 15 Sim. 484 ; *Rodney v. Rodney*, 16 Sim. 307 ;

Dinning v. Henderson, 2 Coll. 330.

(f) No. 17.

(g) *Quære*, in what ? The sale, *semble*.

(h) *Elworthy v. Billing*, 10 Sim. 98 ; Sug. 66 ; but see *Wilson v. Greenwood*, 10 Sim. 101, n.

(i) See *Domville v. Berrington*, 2 You. & C. Ex. 723.

(k) *Sidny v. Ranger*, 12 Sim. 118 ;

A residuary legatee (*l*), or tenant for life, or owner of a reversionary interest in the estate, may, (subject to the above restriction,) purchase on a sale by the Court; and Lord *Eldon*, although disapproving of the rule, has referred to its existence as free from doubt (*m*). In a late case, an application by an executor in an administration suit for leave to bid, was refused (*n*).

In general, the plaintiff conducts the sale (*o*); in which case his solicitor is considered, as between the vendors and the purchaser, to be the agent of all the parties to the suit (*p*): the Master, however, may, if he consider it for the benefit of the parties to the suit, give the conduct of the sale to a person other than the plaintiff (*q*).

Who conducts sale.

Where a suit is instituted to carry into execution the trusts of an instrument which directs a sale upon the occurrence of a specified event, and some of the parties interested in the proceeds of sale are not *sui juris*, the Court has no power to direct a sale before the occurrence of such event (*r*): however injurious delay may be to the property (*s*).

Court, when executing trust, cannot anticipate time thereby fixed for sale.

Assuming the Court to have properly directed a sale, the same usually takes place before the Master (*t*): but he may, if he shall think it for the benefit of the parties interested, order the estate to be sold in the country, at such place and by such person as he shall think fit (*u*). It is stated, in a work of reputation, that a London auc-

Sale may be in town or country.

such an order may be brought under the review of the House of Lords by a purchaser, although he is not a party to the cause; *Bailey v. Maule*, 7 Cl. & Fin. 121, n.

(*l*) *Hooper v. Goodwin*, G. Coop. 95.

(*m*) See *Williams v. Attenborough*, Turn. & R. 76.

(*n*) *Geldard v. Randall*, 9 Jur.

1085.

(*o*) See Dan. Ch. P. by H. 1193.

(*p*) *Dalby v. Pullen*, 1 Russ. & Myl. 296.

(*q*) *Dixon v. Pyner*, 7 Ha. 331.

(*r*) *Blacklow v. Laws*, 2 Ha. 40.

(*s*) *Johnstone v. Baber*, 8 Beav.

233.

(*t*) Dan. Ch. P. by H. 1193.

(*u*) 75th Order of April, 1828.

Chap. XIX.

Relative duties of vendors and purchasers prior to the sale.

Particulars and conditions—preparation, allowance, and nature thereof.

tioneer is never appointed for a country sale (*w*) ; but the rule is not invariable (*x*).

The general rules, to which we have before adverted, respecting the relative duties of intended vendors and purchasers prior to the contract, apply as well to sales under an order of the Court as to ordinary sales ; *e. g.*, puffing cannot be supported in the one case more than in the other (*y*).

The particulars and conditions are prepared by the solicitor of the party conducting the sale (*z*) ; and, if of a special nature, are usually settled by counsel as in other cases ; they must, however, be finally allowed by the Master : the remarks already made (*a*), upon particulars and conditions, are generally applicable as well to sales before a Master as to ordinary sales ; it is not, however, usual, on sales by the Court, to insert the common stipulation as to the best bidder being the purchaser, or as to the estate being put up again and resold in the event of there being any dispute as to the last or highest bidding (*b*), nor is it usual to require the payment of a deposit, except upon the sale of standing timber separately from the estate (*c*) ; or to insert any stipulation that the purchaser shall sign an agreement to complete the purchase (*d*) ; but he is, independently of stipulation, bound to sign his name, description, and place of abode, after the amount of his bidding, on a copy of the particulars (*e*). If a reserved bidding is considered desirable, the insertion of a condition to that effect must be authorized by the Court ; and the proper course is, to apply by motion on petition (*f*) for

(*w*) Dan. Ch. P. by H. 1194.

(*x*) In *Bracey v. Earl of Scarborough*, V. C. W., July, 1849, estates were sold at Bristol by Messrs. Farebrother and Co.

(*y*) Sug. 64.

(*z*) Dan. Ch. P. by H. 1195.

(*a*) Ch. IV.

(*b*) 3 Dav. Conv. 92.

(*c*) Dan. Ch. P. by H. 1197.

(*d*) See 3 Dav. Conv. 92.

(*e*) Dan. Ch. P. by H. 1197.

(*f*) See *Brooker v. Collier*, 3 Russ. 369.

such a direction, when an order will be made for the Master to fix a reserved bidding, if he shall think fit (*g*). Chap. XIX.

In a modern case, where a deposit was deemed desirable, the Court refused to sanction its payment to the Master's clerk, but allowed it to be paid to the solicitors of a defendant in the cause, they undertaking by counsel to account for it, and the defendant submitting to be bound by any future order which the Court might make respecting it (*h*). Payment of deposit—arrangement respecting.

There are two advertisements of sale; each of which must be allowed by the Master, and inserted in the Gazette, and should also be inserted in other London, and, (if the estate be in the country,) provincial newspapers; the time of sale is stated only in the second, or peremptory advertisement, having been previously fixed by the Master with the approbation of the parties to the cause; the warrant to attend him for that purpose should be served on the solicitors of all the parties (*i*). Advertisements of sale.

When the estate is sold by the Master, the sum of 5*l*., if the entire purchase-money (whether the estate be sold in one lot or several lots) does not exceed 2000*l*., or, if it exceed that sum, then five shilling on every 100*l*., is payable by such party as the Master shall direct (*k*); if the estate is sold in the country, the auctioneer is usually allowed, not a per-centage on the purchase-money, but a fixed sum, the amount of which is previously settled with him by the vendor's solicitor with the approval of the Master (*l*). Expenses of sale.

If an incompetent person, (as a lunatic,) is declared the highest bidder, the Court cannot hold the next bidder to Highest bidding by a person incompetent,

(*g*) Dan. Ch. P. by H. 1194;
Shaw v. Simpson, cited 1 Jac. & W.
392; as to form of order, see *Jervoise*
v. Clarke, *ibid.* 391.

(*h*) *Lyon v. Colvill*, 6 Jur. 680,
V. C. K. B.

(*i*) See Dan. Ch. P. by H. 1195.

(*k*) See Schedule to Orders of 21st
December, 1833; *Re Allen's Charities*,
2 Myl. & K. 627.

(*l*) Dan. Ch. P. by H. 1194.

Chap. XIX.
or of insuffi-
cient
means—
effect of.

his bidding, or even allow him to stand as purchaser with the consent of the parties to the cause (*m*) ; in a recent case, where the offer of the highest bidder was rejected, under the idea that he was of insufficient means, and the next bidder was declared the purchaser, the Court did not treat the sale as void, but seemed to consider that the highest bidder should have moved that he, instead of the other, might be declared the purchaser (*n*).

Bidding
after estate
bought in.

Where a purchaser made an offer after the auctioneer had declared the amount of the reserved bidding, it was held that this was an offer respecting which a special application to the Court was necessary (*o*).

Resale of
lots re-
maining
unsold.

Any lots remaining unsold may be again advertised for sale (*p*).

(2.) *As to the rights and liabilities of the highest bidder, after the sale but before confirmation of the Master's report ;—and as to opening biddings.*

Highest
bidder not
the pur-
chaser until
Master's
report con-
firmed—his
rights in
the interim.

The fact of being, and being declared, the highest bidder, does not at once invest such bidder with the character of purchaser ; nor does he assume that character until the Master's report is made and confirmed as hereinafter mentioned : and it has been held by Sir *E. Sugden*, C., that the Master has a discretion, and is not absolutely bound to accept the highest bidder (*q*) : a loss by fire, even after the report, but before confirmation, falls therefore on the vendors (*r*) : and a motion before confirmation, that the best bidder shall complete, and pay his purchase-money, by a certain day, will be refused (*s*) : but, if the interest

(*m*) Sug. 72 ; *Blackbeard v. Lindgren*, 1 Cox, 205 ; *sed quære*, whether the Court might not treat the case as one of an offer to purchase by private contract.

(*n*) *Hughes v. Lipscombe*, 6 Ha. 142.

(*o*) *Dowle v. Lucy*, 4 Ha. 311.

(*p*) Sug. 66.

(*q*) *In re Costello's*, 2 J. & L. 244, 246, 249.

(*r*) *Ex parte Minor*, 11 Ves. 559.

(*s*) *Anon.* 2 Ves. jun. 335.

purchased be in its own nature determinable—*e. g.*, a life estate,—it seems that the report will be confirmed, and he must pay the purchase-money, although the event, upon which the interest determines, occur before confirmation (*t*): so, if the report be confirmed, he will, in the case of a life estate, be entitled to the intermediate income (*u*).

The death of the purchaser before confirmation of the report, does not, however, vacate the sale, even although he never signed an agreement; sales by the Court, not being within the Statute of Frauds (*w*): but the contract cannot be enforced against his representatives without suit (*x*): and it is the practice in such a case not to serve the heir with notice of an application to open the biddings (*y*).

If, before the report is confirmed absolutely, the purchaser re-sell at a profit, the sub-purchaser becomes the purchaser under the Court at the advanced price (*z*): in a late case, where the first purchaser had received the advance in price and had absconded, the Court directed the property to be resold; reserving the question whether, if it should not produce the sum offered by the sub-purchaser, he should not be answerable to the Court for the difference; and reserving all questions of liability in the original purchaser (*a*).

Until the report is confirmed absolutely, the expectant purchaser may lose his bargain by the Court opening, (as it is termed,) the biddings; that is, directing a re-sale, on the application of a person willing to give a higher price for the property; and this, although he be interested in

Death of, before confirmation—contract cannot be enforced against representatives without suit.

Subsale at a profit before confirmation—is for the benefit of the estate.

Until confirmation biddings may be opened on sufficient advance in price.

(*t*) *Anson v. Tourgood*, 1 Jac. & W. 639; and see *Vesey v. Elwood*, 2 Con. & L. 47; 3 Dru. & W. 74, overruling *Vincent v. Going*, cited *ibid.* p. 75.

(*u*) *Anson v. Tourgood*, 1 Jac. & W. 637.

(*w*) See *Att.-Gen. v. Day*, 1 Ves.

221.

(*x*) *Lord v. Lord*, 1 Sim. 503.

(*y*) *Templer v. Sweet*, 8 Beav. 464; Lord Langdale's private opinion seems to have been that the heir should be served.

(*z*) *Hodder v. Ruffin*, Taml. 341.

(*a*) *Holroyd v. W'gatt*, 2 Coll. 329.

Chap. XIX. the proceeds of sale (*b*), or were present at the sale (*c*); but, in the last case, the Court will regard the application with some jealousy, and will require a larger advance than under ordinary circumstances (*d*): and they may be opened a second time (*e*) on the application of the same person (*f*).

What advance is sufficient for the purpose.

The sufficiency of the advance is considered with reference to the entire purchase-money; including the price of timber, if valued separately from the estate (*g*): as to what constitutes sufficiency, no definite rule seems to exist; but about ten *per cent.* seems to be the usual advance on small sums (*h*); the Court has accepted an advance of 60*l.* upon 430*l.* (*i*), of 80*l.* upon 775*l.* (*k*), of 50*l.* on 395*l.* (*l*), and of 365*l.* on 7300*l.* (*m*); in a late case, the Court refused 300*l.*, but accepted 350*l.* on 3500*l.* (*n*): and it seems that, whatever be its rate, an advance of less amount than 40*l.* will be refused (*o*); but an advance of 105*l.*, upon the aggregate price of nine lots sold to the same purchaser, has been accepted (*p*). In the case of property of fluctuating

(*b*) *Hooper v. Goodwin*, G. Coop. 677.
95.

(*c*) *Thornhill v. Thornhill*, 2 Jac. & W. 347, overruling earlier cases there cited; see Sug. 88, n.

(*d*) *Tyndale v. Warre*, Jac. 525, 526; *Lefroy v. Lefroy*, 2 Russ. 606; *Shallcross v. Hibberson*, 1 C. P. Coop. N. R. 380.

(*e*) *Scott v. Nesbit*, 3 Bro. C. C. 475; *Walond v. Walond*, 8 Beav. 352.

(*f*) *Preston v. Barker*, 16 Ves. 140; Sug. 85.

(*g*) *Bates v. Bonnor*, 6 Sim. 380.

(*h*) See Sug. 85; Dan. Ch. P. by H. 1210; and 2 Coll. 537.

(*i*) *Bourn v. Bourn*, 13 Sim. 189.

(*k*) *Connell v. Hardie*, 3 You. & C.

(*l*) *Hughes v. Lipscombe*, 6 Ha. 142.

(*m*) *Domville v. Berrington*, 2 You. & C. Ex. 723; and see *Walond v. Walond*, 8 Beav. 352.

(*n*) *Holroyd v. Wyatt*, 2 Coll. 537.

(*o*) See *Farlow v. Weildon*, 4 Madd. 460; *Gilbert v. Wetherell*, there cited; *Brookfield v. Bradley*, 1 Sim. & St. 23; *Ward v. Cooke*, 9 Sim. 87; in *Templer v. Sweet*, 8 Beav. 464, the advance was in fact 50*l.* instead of 30*l.*; see Reg. Lib. B. 1844, fo. 1224.

(*p*) *Humphries v. Roberts*, 6 Jur. 680, V. C. K. B.; *vide infra*, p. 558, n.

value, as a colliery (*q*), (if in work or recently worked (*r*),) the Court is generally unwilling to risk a resale, and has refused an advance of 1150*l.* upon 8850*l.* (*s*): but in a recent case, where the property was held upon lives, the Court evaded the difficulty by accepting an advance of 350*l.* on 5500*l.*, on condition that the party opening should be bound by his offer if no better bidding *could be enforced* (*t*).

Where several lots are purchased by the same person, and the biddings are opened as to any of them, he may give up those which he subsequently purchased, on satisfying the Court that he bought them in consequence of having purchased the prior lot (*u*); and a like indulgence would probably be granted if, the biddings in respect of a subsequent lot being opened, he could satisfy the Court that he bought the prior lot with a view of purchasing such subsequent lot (*w*): and a person seeking to open biddings on some only out of several lots bought by the same purchaser, will therefore be required to take such other lots at their original price, if the purchaser shall decline them, and they shall not fetch so much on a resale (*x*).

The person wishing to open a bidding must, at his own expense, apply for leave, by motion, notice of which must be given to the parties in the cause, and the purchaser (*y*), but not to the heir of a purchaser dying before confirmation of the Master's report (*z*): he cannot in one motion include lots sold to separate purchasers (*a*): if his offer be

When opening biddings on any of several lots taken by the same purchaser discharges him as to the residue.

Course of proceeding to open biddings.

(*q*) *Williams v. Attenborough*,
Turn. & Russ. 70.

(*r*) *Jeffreys v. Smith*, 1 C. P. Coop.
N. R. 381.

(*s*) *Williams v. Attenborough*,
Turn. & Russ. 70.

(*t*) *Walond v. Walond*, 8 Beav.
352; see *Wren v. Kirton*, 8 Ves. 502.

(*u*) *Price v. Price*, and *Fielder v.*

Fielder, 1 Sim. & St. 386.

(*w*) See Sug. 89; *Ex parte Tilsley*,
4 Madd. 227, n.; *et vide supra*, 507,
as to connecting lots.

(*x*) *Bates v. Bonnor*, 6 Sim. 380.

(*y*) Sug. 84; Dan. Ch. P. by H.
1214.

(*z*) *Templer v. Sweet*, 8 Beav. 464.

(*a*) *Goodall v. Pickford*, 6 Sim.

Chap. XIX.

Deposit
required.First purchaser to
be paid interest and
costs.Biddings
may be re-
opened on
neglect to
pay in
deposit.

Resale.

accepted, the order will, in general, be made on condition that he pay, as a deposit, the amount of his advance (*b*) ; and this he must do at his own expense (*c*) : however, in a recent case, where an advance of 7000*l.* was offered upon 27,000*l.*, Lord Langdale allowed the biddings to be opened on payment into Court of only 3400*l.* (*d*) : he must also pay to the first purchaser interest, at four *per cent.*, on such part of his purchase-money as may have lain dead (*e*) ; and his costs, including any costs which he himself paid on opening former biddings (*f*), and also, it would seem, (although no special directions will in general be given (*g*),) his or his agent's costs of a journey to the estate (*h*) : and where property which had been sold in several lots was directed to be resold in a single lot, the Court, under the special circumstances, directed that the person opening the biddings should pay to the purchasers their expenses of surveying the estate (*i*).

If the person obtaining the order neglect to draw it up and pay the deposit, any other person may, upon notice to him, move to open the biddings (*k*).

The order being obtained and drawn up, and the deposit paid, the estate will then be resold, and the proceedings on the resale will be similar to those on the original sale (*l*) ; it appears doubtful whether the estate can be re-allotted without a special order (*m*), made on special reasons (*n*).

379. In *Humphries v. Roberts*, 6 Jur. 680, the nine lots appear to have been bought by the same purchaser ; see Registrar's Minute Book, Trin. T. 1842, fol. 258, where the case is entered as *Jones v. Williams*.

(*b*) See *Anon.* 6 Ves. 513.

(*c*) Sug. 84.

(*d*) *Manners v. Furze*, 17 L. J., N. S. Ch., 485, R.

(*e*) *Re Birch*, Sug. 85.

(*f*) *Bates v. Bonnor*, 6 Sim. 382.

(*g*) See *Anon.* 2 Ves. jun. 286.

(*h*) *S. C.* ; and see note to *Farlow v. Weildon*, 4 Madd. 461.

(*i*) *Watts v. Martin*, 4 Bro. C. C. 113, Belt's edition.

(*k*) *Gibbons v. Howell*, 4 Madd. 52.

(*l*) Dan. Ch. P. by H. 1215.

(*m*) *Ibid.* ; and compare Sug. 87.

(*n*) *Ward v. Cooke*, 9 Sim. 87 ;

The first purchaser is entirely discharged by the order opening the biddings (*o*).

If, upon a re-sale, the person opening the biddings be outbid, he is, in the absence of any special agreement with the Court (*p*), discharged from his offer (*q*), and may reclaim his deposit, but without costs (*r*), although the price of the estate has been more than doubled by the re-sale (*s*); but such costs (*t*), and also interest at 4*l.* *per cent.* on the deposit (*u*), have been allowed where the biddings have been opened merely for the benefit of the parties interested in the proceeds of the estate.

A person opening biddings in a fictitious name, will be compelled to take the estate at the price at which he opened them (*w*), if, on a re-sale, no better offer is made and can be enforced (*x*).

Chap. XIX.

First purchaser discharged by order opening biddings.

Person opening biddings if outbid at resale is *prima facie* discharged.

When entitled to costs.

Opening biddings in fictitious name.

(3.) *As to confirming the Master's report of the purchase;—and as to the purchaser's rights and liabilities after confirmation.*

The person who eventually is the highest bidder, and who wishes to complete his purchase, must, at his own expense, procure, file, take an office copy of, and apply to the Court, (either by motion, or petition of course at the Rolls,) to confirm, the Master's report of his being the best bidder (*y*); whereupon an order *nisi* is made, confirming the report unless cause be shown within a specified

Course of proceeding by purchaser to confirm Master's report.

and see *Humphries v. Roberts*, 6 Jur. 680, *supra*, p. 558.

Ves. 214.

(*t*) *S. C.*; *Owen v. Foulks*, 9 Ves.

348; *West v. Vincent*, 12 Ves. 6;

Chapman v. Fowler, 3 Ha. 577.

(*p*) See *Walond v. Walond*, 8 Beav. 352.

(*u*) *Filder v. Bellingham*, 1 Coll. 526; *Gravenor v. Miles*, 8 Jur. 838, V. C. K. B.

(*q*) See *S. C.*, and *Williams v. Attenborough*, Turn. & R. 77.

(*w*) *Molesworth v. Opie*, 1 Dick. 289.

(*r*) *Rigby v. M'Namara*, 6 Ves. 466; *Trefusis v. Clinton*, 1 Ves. & B. 361.

(*x*) Sug. 88.

(*y*) *Dan. Ch. P.* by H. 1199.

(*s*) *Earl Macclesfield v. Blake*, 8

Chap. XIX. time after service: he must then, at his own expense, procure an office copy of such order, and, at the expiration of the time therein limited, (but not before, even with consent (*z*),) apply to the Court for an order confirming the report absolutely; which order is made, of course, on an affidavit of service of the order *nisi*, and certificate of no cause having been shown (*a*). No notice of either application is required (*b*), but the second order can be made only on a seal day (*c*). He should not procure the second order while under notice of an application to open the biddings (*d*); but the order, if so obtained, must be discharged before the biddings can be opened (*e*).

After confirmation, purchaser *primâ facie*, entitled to estate subject to payment of price.

After the report is confirmed absolutely the purchaser becomes the owner of the estate, subject to payment of the purchase-money, and is not liable to have the biddings opened on the mere ground of advance in price (*f*), or of negligence, surprise, &c., on the part of the vendors (*g*), or of mistake on the part of an intended bidder (*h*); but only on the ground of fraud or misconduct in the purchaser, or of his fiduciary character, or of some fraudulent negligence in another person,—*e. g.*, the agent for sale,—of which it is against conscience that the purchaser should take advantage (*i*): he is also liable to any loss which may happen in connection with the estate; as, in a recent case, the expenses of making good damages caused to adjoin-

(*z*) *Vernon v. Thellusson*, 10 Beav. 452.

(*a*) Dan. Ch. P. by H. 1199; Sug. 70.

(*b*) *Ibid*.

(*c*) *Robertson v. Skelton*, 10 Beav. 199; this is an exception from the general practice as to motions of course.

(*d*) *Vansittart v. Collier*, 2 Sim. & St. 608; *Watson v. Brickwood*, there cited.

(*e*) *Vansittart v. James*, 1 C. P. Coop. N. R. 379.

(*f*) *Morice v. Bishop of Durham*, 11 Ves. 57; *White v. Wilson*, 14 Ves. 151; *Fergus, Executors of, v. Gore*, 1 Sch. & Lef. 350.

(*g*) See 14 Ves. 153.

(*h*) *Anon.* 1 Ves. jun. 453.

(*i*) See *Morice v. Bishop of Durham*, 11 Ves. 57; and, as to fraud, see cases cited, Sug. 87.

ing property by the fall of the houses which he had purchased (*k*).

Chap. XIX.

He may apply by motion, on notice, for leave to pay his purchase-money into the Bank, and to be let into possession; or, if incumbrances appear in the report, or, (*semble*) if not so appearing, the same are known to exist, and all parties to the suit are *sui juris* and agree to their discharge, for leave to pay them off out of the purchase-money, and to pay in the balance (*l*): the payment, however, must be an entire payment, although the lot be sold to joint purchasers (*m*): where interest is payable, the same must be paid in full without deducting the income tax (*n*).

May move to pay in his purchase-money, or to discharge incumbrances.

The Court will, either before or after the report is confirmed, discharge the purchaser and substitute any other person (*o*), upon his paying in the entire purchase-money, and upon an affidavit that there is no under-bargain (*p*); and such an order has been made where the first purchaser, after confirmation of the report, had agreed in writing to sell the property, and had since died, and his heir was abroad (*q*): and, where the same motion asks for such substitution and for leave to pay in the money and be let into possession, since no additional costs are incurred by the parties to the cause than would have been incurred on the usual motion to pay in purchase-money, no costs will be given (*r*).

Substitution of purchaser allowed, on what terms.

(*k*) *Skelton v. Robertson*, 14 Jur. 12 Beav. 43.
323.

(*o*) See Sug. 66.

(*l*) Dan. Ch. P. by H. 1202; Sug.
72.

(*p*) *Rigby v. Macnamara*, 6 Ves.
515; *Vale v. Davenport*, 6 Ves. 615;

and see *Miller v. Smith*, 6 Ha. 609.

(*m*) *Darkin v. Marye*, 1 Anst. 22.
(*n*) *Hobroyd v. Wyatt*, 1 De G. &

(*q*) *Pearce v. Pearce*, 7 Sim. 138.

S. 125; *Dawson v. Dawson*, 11 Jur.
984, V. C. E.; *Humble v. Humble*,

(*r*) *Christian v. Chambers*, 4 Ha.
307.

Chap. XIX.

(4.) *As to the investigation of the title ;—payment and application of purchase-money ;—possession ;—and preparation and execution of the conveyance.*

Abstract—
and title.

Delivery of the abstract may, if necessary, be compelled by an order obtained on motion (*s*) ; and, if dissatisfied with the title shown thereby, the purchaser may procure an order that the title be referred to the Master ; upon which reference the proceedings will be similar to those in a suit for specific performance (*t*) : contrary to the rule which prevails in ordinary sales, the Court will compel the purchaser to take an equitable title (*u*) ; but only where the legal estate is outstanding without any claim of interest on the part of the person in whom it is vested (*w*) ; nor will it compel him to take a doubtful equitable title (*x*) ; nor, perhaps, where there is material error in the decree, to wait until the same is rectified (*y*). In a late case, where a purchaser had accepted the title and paid in his purchase-money, he was discharged from the contract upon a deed being discovered which showed that the plaintiffs could not make a title to more than a moiety of the estate (*z*) : but a purchaser, who, having discovered a supposed defect in the title, buys in the interest of the party who alone could take advantage of it, will not be allowed the benefit of the general rule as to doubtful titles (*a*).

Costs of
reference.

It is stated by Sir *E. Sugden* (*b*), that, in every case, the purchaser is entitled to the costs of the motion for a

(*s*) Dan. Ch. P. by H. 1168.

(*t*) *Ibid.* 1200.

(*u*) 14 Sim. 312 ; and see Sug. 255.

(*w*) *Craddock v. Piper*, 14 Sim. see p. 312 ; and see 3 Ves. 23.

(*x*) *Marlow v. Smith*, 2 P. Wms. 201.

(*y*) *Lechmere v. Brasier*, 2 Jac. &

W. 287 ; but see *Sherwood v. Beveridge*, 13 Jur. 1042, V. C. K. B.

(*z*) *Ward v. Trathen*, 14 Sim. 82 ; S. C. 8 Jur. 303.

(*a*) *Sheppard v. Doolan*, 3 Dru. & W. 1.

(*b*) Sug. 76, citing *Camden v. Benson*, 1 Keen, 671.

reference of title, and to the costs of that reference : it appears, however, from a recent case (*c*), that the decision, upon which the above proposition was founded, is misreported ; and that the Court only held that the purchaser was not liable to *pay* costs, on the Master reporting in favour of the title : if, however, the title were made out before the Master, on grounds not appearing on the abstract, he would be entitled to receive costs (*d*). If the title prove bad, the purchaser is entitled to receive his costs, charges, and expenses, out of the fund in Court (if any) (*e*), or, if there be none, from the plaintiff, who may recover them in the suit (*f*) : it is said to have been held by Sir *J. Leach* that, where exceptions are allowed to the Master's report in favour of the title, the Court will not thereupon direct that the purchaser be discharged and his costs be paid, but that some specific application must be made for the purpose (*g*). And it appears that, where the title is decided to be bad, the purchaser must be actually discharged by order, before there can be a resale (*h*).

Where the sale has taken place under circumstances which, in the case of an ordinary sale, would be a defence to a suit for specific performance, except with a variation, but would not be a ground for rescinding the contract, the Court, as the property must be sold, is obliged to decide whether the sale is to be carried into effect, or the property is to be resold : but, so far as possible, the rules which regulate such cases between ordinary vendors and

(*c*) See *Flower v. Hartopp*, 8 Beav. 200.

(*d*) *Fidler v. Higginson*, 3 Ves. & B. 142 ; the purchase in which case seems to have been made under a decree ; see 2 Sim. & St. 117.

(*e*) *Reynolds v. Blake*, 2 Sim. & St. 117 ; *Att.-Gen. v. Corp. of Newark*,

8 Sim. 71 ; *Calvert v. Godfrey*, 6 Beav. 97.

(*f*) *Berry v. Johnson*, 2 Y. & C. Ex. 564, 565 ; *Smith v. Nelson*, 2 Sim. & St. 557.

(*g*) *Hide v. Hide*, 1 C. P. Coop. N. R. 379.

(*h*) *Williams v. Wace*, *ibid.*

Chap. XIX.

Purchase-money may, under special circumstances, be paid in without accepting title.

As to its application and distribution.

purchasers will be adapted to purchases under orders of the Court (*i*).

Although the practice has varied (*k*), it is now clearly the rule of the Court, that, on a special case, as where the purchaser is entitled to relieve himself from paying interest, the Court will receive the purchase-money on his application, without his accepting the title (*l*): but the order will not be made except in a special case (*m*); nor will it be extended so as to let him into possession (*n*): and where a purchaser, without the authority of the Court, enters into possession, although with the consent of the vendor's solicitor, he will be held to have accepted the title (*o*), and will be at once ordered to pay in his purchase-money (*p*).

When the purchase-money is paid into Court, it will not, without the purchaser's consent, be applied in discharge of incumbrances, on the ground of his delay in preparing the draft conveyance (*q*): it is, however, usual, upon paying in the money, expressly to ask that it may not be paid out again without notice to the purchaser; an order to which effect prevents the distribution of the fund without the purchaser's consent given in Court, or upon his non-appearance and an affidavit of his having been served with a copy of the order for setting down the cause on further directions, or of the petition for distribution (*r*);

(*i*) *Alvanley v. Kinnaird*, 2 Mac. & G. 1, 8.

(*k*) See Sug. 73; *Denning v. Henderson*, 1 De G. & S. 689; and *Rutter v. Marriott*, 10 Beav. 33.

(*l*) Per Lord Cottenham in *De Visme v. De Visme*, 1 Mac. & G. 344; *Hindle v. Dakins*, 1 C. P. Coop. N. R. 378; *Morris v. Bull*, 1 De G. & S. 691, n.

(*m*) *Ouseley v. Anstruther*, 11 Beav. 399.

(*n*) *Hutton v. Mansell*, 2 Beav. 260; *Rutter v. Marriott*, 10 Beav. 33; *Dempsey v. Dempsey*, 1 De G. & S. 691.

(*o*) *Wilding v. Andrews*, 1 C. P. Coop. N. R. 380.

(*p*) *S. C.*; and see *Anon.* cited Sug. 74.

(*q*) *Bevan v. Bevan*, 1 C. P. Coop. N. R. 381.

(*r*) *Dan. Ch. P.* by H. 1203.

in a late case Lord *Langdale* appears to have held that, Chap. XIX. although the estate was sold for payment of debts, the Court ought not to distribute the fund until an effectual conveyance could be made to the purchaser (*s*).

We may here observe that an incumbrancer consenting to a sale in an administration suit is entitled to be paid his principal, interest, and costs, out of the purchase-money, in priority to the costs of the plaintiff in the cause (*t*) ; and, as a general rule, a decree for sale of an incumbered estate does not, of itself, alter the rights of the parties ; so that where estates subject to numerous and complicated incumbrances were sold, by consent, it was held that to authorize payment of the costs of sale in the first place out of the general fund there should have been a special direction in the decree ; and that, there being no such direction, the money arising from the sale of each estate ought to be treated as the estate itself would have been ; and that the mortgagees ought to be paid their principal, interest, and costs, according to their respective priorities (*u*) : but where a first mortgagee with power of sale unnecessarily files a bill praying a sale, subsequent incumbrancers, although they consent to the sale, are entitled to their costs out of the purchase-money, although it be insufficient to pay off the first charge (*w*).

Where the estate is incumbered.

If the purchaser, before completion, is served with a petition or motion for payment of the purchase-money out of Court, he is entitled to his costs of appearing on the application, although he make no opposition (*x*).

Purchaser's costs of appearing on petition for its distribution, when allowed.

If the money has been invested on his application, he

(*s*) *Heming v. Archer*, 9 Beav. 366 ; see and consider *Morris v. Clarkson*, 3 Sw. 558, and other cases cited in reporter's note, *et quare*.
(*u*) *Wild v. Lockhart*, 10 Beav. 320 ; and see *Aldridge v. Westbrook*, 5 Beav. 188.

(*t*) *Hepworth v. Heslop*, 3 Ha. 485 ; and see *Tipping v. Power*, 1 Ha. 405.
(*w*) *Cooke v. Brown*, 4 Y. & C. 227.
(*x*) *Bamford v. Watts*, 2 Beav. 201.

Chap. XIX.

If invested
at pur-
chaser's re-
quest, he
takes the
proceeds of
investment
if contract
rescinded.

Possession—
from what
time pur-
chaser is
entitled to.

must, if the purchase is rescinded, take the stock, notwithstanding any variation in the funds (*y*).

Where the conditions of sale are silent as to the time when he is to have possession, and as to interest upon the purchase-money, the rule of the Court is, that he shall be let into possession from the quarter-day preceding the confirmation absolute of the Master's report of his being the purchaser, he paying his purchase-money into Court before the following quarter-day (*z*) ; and although he may not pay his purchase-money into Court until the quarter is nearly expired, yet he will not be liable to pay interest (*a*) unless the estate be a reversion, in which case interest is payable from the date of the purchase (*b*) ; if he delay payment, he will take the rent only from the quarter-day preceding payment (*c*) : nor will he be allowed the rents from an earlier day on the ground of his money having lain idle (*d*) ; where, as in the case of a colliery, the profits are ascertained monthly or weekly, he will be entitled to them from the commencement of the month or week (as the case may be) in which he pays his money (*e*) ; and the same principle would, it is conceived, prevail where, as often happens with house property, the rents are paid at shorter intervals than a quarter ; while on the other hand, if rents are reserved half-yearly, the purchaser would seem, on principle, to be entitled to them from the commencement of the current half, instead of quarter, year : on the purchase of a manor, fines on descent, are, for the purpose of the above rules, considered to accrue due on the death of the copyholder, and not on the admission of his heir or devisee (*f*).

(*y*) *Hodder v. Ruffin*, cited Sug. Sim. 359.
89.

(*z*) *Maurice v. Wainewright*, C. P.
Coop. N. R. 378.

(*a*) *S. C.*

(*b*) *Trefusis v. Lord Clinton*, 2

(*c*) Sug. 73.

(*d*) *Ibid.* ; *Hindle v. Dakins*, 1 C.
P. Coop. N. R. 378.

(*e*) *Wren v. Kirton*, 8 Ves. 502.

(*f*) *Garrick v. Lord Camden*, 2

On the purchase of a life interest in stock, the purchaser pays interest and takes the dividends from the day of sale (*g*): on the purchase of a life annuity, secured by bond and payable quarterly, he must pay interest and take the annuity from the day on which he could first have confirmed the report (*h*).

Chap. XIX.

On purchase of life interest or life annuity.

The remarks already made (*i*) as to the abstract, searches for incumbrances, and matters arising between its delivery and the preparation of the conveyance, are generally applicable as well to sales by the Court as to ordinary sales.

As to the abstract, &c.

The conveyance, if an infant be a necessary conveying party (*k*), or if, although he be not a party, it will by statute have the effect of divesting his estate (*l*), must be settled by the Master; but, with this exception, it is usual to direct only that the draft be settled by the Master in case the parties differ (*m*); and, when the order is so worded, a purchaser going before the Master pays his own costs, unless he can make out special grounds for exemption (*n*): the practice before the Master is similar to that in a suit for specific performance (*o*).

Conveyance—when to be settled by Master.

Upon the sale by the Court of leaseholds of a testator, his executor, although he have not been in possession, is entitled to an indemnity from the purchaser against the rent and covenants (*p*).

Executor of lessee entitled to indemnity from purchaser of leaseholds.

Cox, 231; the marginal note is incorrect: it will be seen from the case that the admissions were *after* and not *before* the time fixed for completion; see *Earl Hardwicke v. Lord Sandys*, 12 M. & W. 761.

(*g*) *Anson v. Towgood*, 1 Jac. & W. 637.

(*h*) *Twigg v. Fifield*, 13 Ves. 517.

(*i*) *Supra*, Ch. VIII., X., XI.

(*k*) *Calvert v. Godfrey*, 2 Beav. 267.

(*l*) *Cheese v. Cheese*, 15 L. J., N.

S. 28, V. C. S.; *aliter*, if the infant be only interested in the proceeds of sale (*Richardson v. Ward*, 11 Beav. 378): the consequent costs must be borne by the funds in Court: *Brown v. Lake*, 15 L. J., N. S., 34, V. C. K. B.

(*m*) Sug. 75.

(*n*) *Hodgson v. Shaw*, 11 Jur. 95, V. C. K. B.

(*o*) *Vide supra*, 586.

(*p*) *Cochrane v. Robinson*, 11 Sim.

378.

Chap. XIX.

Purchaser may require concurrence of all necessary parties.

Who are such.

Party refusing may be ordered to convey.

Against whom order will be made.

The purchaser may require the concurrence of all persons having a legal title to, or remedy against, the property, although parties to the suit (*q*); except, perhaps, a dowress, whose dower is barred by a term or equitable jointure (*r*); but cannot, it would seem, "if he acquire the legal estate, require, at the seller's expense, a release from equitable incumbrancers whose demands have been satisfied by the Court (*s*);" nor does it, in fact, appear, that he can insist on the concurrence, even at his own expense, of parties having mere equitable interests and who are bound by the decree (*t*); if the decree direct that all proper parties convey, and a party to the suit, whom the Master considers a proper party to the conveyance, refuses to concur, the purchaser should move against the recusant party (and not against the plaintiffs) that he do convey (*u*): it appears that a mortgagee, who has proved his debt, may be required to receive his money and to concur without the usual six month's notice (*w*).

Such an order will not be made against a married woman in respect of her real estate not settled to her separate use (*x*); but will be made against an infant (*y*), and if

(*q*) See and consider *Craddock v. Piper*, 14 Sim. 310.

(*r*) *Vide supra*, pp. 251, 252.

(*s*) Sug. 75, citing *Keatinge v. Keatinge*, 6 Ir. Eq. Rep. 43; and *Webber v. Jones*, *ib.* 142.

(*t*) *Webber v. Jones*, *ubi supra*.

(*u*) *Stillwell or Stilwell v. Mellesh*, 10 Sim. 367; 4 Myl. & Cr. 581.

(*w*) *Matson v. Swift*, 5 Jur. 645.

(*x*) *Jordan v. Jones*, 2 Ph. 170.

(*y*) As to conveyances on sales in creditor's suits, see 1 Will. IV. c. 47, ss. 11 and 12, amended by 2 & 3 Vict. c. 60, and 11 & 12 Vict. c. 87; and see *Penny v. Pretor*, 9 Sim. 135; *Walker v. Aston*, 14 Sim. 87;

Heming v. Archer, 8 Jur. 945; 7 Beav. 515; 8 Beav. 294: an infant tenant in tail may be ordered to convey, *Radcliffe v. Eccles*, 1 Keen, 130; *Penny v. Pretor*, *supra*: a suit by an equitable mortgagee praying a sale is within the statute; and the infant heir of the mortgagor will be ordered to convey, although the mortgagee is, with the permission of the Court, the purchaser; and although, if the decree had been for foreclosure, the infant would have been allowed to show cause on coming of age; see *Scholefield v. Heafield*, 7 Sim. 669; 8 Sim. 470; *Redshaw v. Newbold*, 12 Jur. 833, V. C. K. B.; *Clinton v. Bernard*, 1 Dru.

he refuse to execute, an attachment may issue against him (*z*). Chap. XIX

But the more usual course of proceeding, where a party to the suit refused to execute, has been to treat such party as a trustee within the 1 Will. IV. c. 60, and to obtain an order for some other person to convey under the Act; and this course might have been adopted when the recusant party was a married woman (*a*), infant (*b*), lunatic (*c*), or mere tenant for life (*d*): and the mere decree directing a sale and all proper parties to convey, made the owner of the legal estate, if party to the suit, a trustee within the Act (*e*): and an order for a conveyance, or a vesting or releasing order having the effect of a conveyance, may now be obtained under the 13 & 14 Vict. c. 60 (*f*).

Party refusing may be declared a trustee.

(5.) *As to the purchaser's rights after completion.*

Upon the execution of the conveyance the purchaser is, as a general rule, entitled to have the title deeds delivered to him; and an order for their delivery, if not provided for in the order for payment of the purchase-money, may be obtained on motion (*g*): on a sale in lots, in the absence of special agreement, the purchaser of the largest lot is entitled to the deeds as against the purchaser of

Purchaser after conveyance executed may claim the deeds.

287, *et vide supra*, p. 312; but see now the Trustee Act, 1850, sects. 29 and 30: *quære*, whether under the 1 Will. IV. c. 47, and the 3 & 4 Will. IV. c. 104, the Court can sell copyholds; see *Branch v. Browne*, 12 Jur. 768, V. C. K. B.

(*z*) *Thomas v. Gwynne*, 8 Beav. 312; and see *Re Beech*, 4 Madd. 128.

(*a*) *Jordan v. Jones*, 2 Ph. 170; *Billing v. Webb*, 1 De G. & S. 716; and see *Jumpson v. Pitchers*, 1 Coll. 13; *Hood v. Hall*, 14 Jur. 127, V. C. W.

(*b*) *Walters v. Jackson*, 12 Sim. 278; *Warburton v. Vaughan*, 4 Y. & C. 247; *Thomas v. Gwynne*, 9 Beav. 275.

(*c*) *In re Blake*, 3 J. & L. 265.

(*d*) *In re Milfield*, 2 Ph. 254.

(*e*) See cases cited in last four notes; and *King v. Leach*, 2 Ha. 57; *Robinson v. Wood*, 5 Beav. 246; *Jackson v. Milfield*, 5 Ha. 538; *In re Blackwell*, 7 Jur. 9, V. C. E.; *Barfield v. Rogers*, 8 Jur. 229, C.

(*f*) Sects. 29 and 30.

(*g*) Dan. Ch. P. by H. 1204.

Chap. XIX.

several lots of larger aggregate amount (*h*) ; if the purchaser, instead of applying to the Court, bring an action at Law against parties to the suit for a document to which he is entitled, he will be restrained by injunction (*i*) : where mortgagees, parties to the suit, consented to the sale, they were ordered to leave the deeds in the Master's office, but it was directed that they should not be delivered to the purchaser without notice to the mortgagees (*j*).

As to at-
tested
copies.

The purchaser is also, in the absence of stipulation, entitled to attested copies and a covenant for the production of the originals of such documents of title as are not delivered to him (*k*) : it may however be remarked that, in *Dare v. Tucker* (*l*), Lord *Eldon* qualified his order for delivery of attested copies by the expression, "unless you leave the originals, or make some other proposal in the Master's office : " so that possibly, upon a sale by the Court, a deposit of the deeds in the Master's office might be sufficient to preclude the right to attested copies ; but such a deposit could probably not be enforced against a purchaser who had purchased to an amount exceeding that of any other purchaser, and the part (if any) remaining unsold.

Will be pro-
tected
against all
parties to
the suit.

Where the estate is sold in accordance with the decree, the Court "will protect the purchaser against the parties to the suit, and all parties coming in under the decree (*n*) ;" and Sir *E. Sugden* considers it to be a general rule "that the purchaser shall not lose the benefit of his purchase by any irregularity in the proceedings in a cause (*n*) : " if, however, the Court clearly exceed its jurisdiction, as if it assume to sell the real estate of infants

Unless
Court
exceed its
jurisdiction.

(*h*) *Kinnard v. Christie*, cited Dan. right, *vide supra*, p. 316.
Ch. P. by H. 1205. (*l*) 6 Ves. 460.

(*i*) *Stubbs v. Sargon*, 4 Beav. 90. (*n*) Sug. 69.

(*j*) *Livesey v. Harding*, 1 Beav. 343, 346. (*n*) Sug. 67, and cases there cited ;
Dan. Ch. P. by H. 1201 ; and see

(*k*) As to the qualification of this *Baker v. Sowter*, 10 Beav. 343.

upon the mere notion that a sale is beneficial (*o*), or, as against *cestuis que trust* not *sui juris*, to anticipate, without special grounds, the time fixed by the author of the trust for the sale of the estate (*p*), it is not clear that the purchaser would be protected by the decree; at any rate he will not be compelled to accept the title: and a purchaser is always bound to see that the sale is according to the decree (*q*); although he is not bound to see that no more property is sold than will be sufficient for the purposes for which a sale was directed (*r*); nor will he, it would seem, be affected by fraud in the proceedings of which he himself is innocent (*s*). Of course, the decree is no protection against persons who ought to have been, but are not, parties to the suit (*t*).

A purchaser, after conveyance, has been allowed compensation out of his purchase-money, on the ground of the rent of the estate having been overstated in the particulars (*u*).

Allowed compensation for misdescription of estate.

(6.) *As to the practice, when the purchaser fails to complete.*

Where the purchaser refuses or neglects to complete his purchase, and is supposed to be a responsible person, the

Course to be adopted if purchaser refuse to complete.

(*o*) *Calvert v. Godfrey*, 6 Beav. 97; see *Peto v. Gardner*, 2 Y. & C. C. C. 312. See, as to special circumstances warranting a sale, *Garnstone v. Gaunt*, 1 Coll. 577; and see, as to the sale by the Court of charity lands, *Att.-Gen. v. Corporation of Newark*, 1 Ha. 395; *Att.-Gen. v. South Sea Company*, 4 Beav. 453, and cases cited: it seems doubtful whether the Court can direct a sale upon petition under Sir S. Romilly's Act (52 Geo. III. c. 101); see *In re Parke's Charity*, 12 Sim. 329; *In re Newton's Charity*, 12 Jur. 1011; *In re Suir*

Island Charity, 3 J. & Lat. 171.

(*p*) *Blacklow v. Laws*, 2 Ha. 40; *Johnstone v. Baber*, 8 Beav. 233.

(*q*) *Colclough v. Sterum*, 3 Bli. 181, 186, 188; *Lutwyche v. Winford* 2 Bro. C. C. 248, 251.

(*r*) *S. C.*

(*s*) See Sug. 67; *Bowen v. Evans*, 1 J. & L. 178; 2 H. L. C. 257; see also, on the general subject, *Thornhill v. Glover*, 3 Dru. & W. 195.

(*t*) *Colclough v. Sterum*, 3 Bli. 181—186.

(*u*) *Cann v. Cann*, 3 Sim. 447.

XX

Chap. XIX.

If supposed
to be irre-
sponsible.

solicitor of the party conducting the sale should procure the Master's report, and the orders confirming it *nisi* and absolutely (*w*); notice of motion for the order absolute must be served on the purchaser (*x*): if, however, the purchaser has obtained the order *nisi*, and neglects to obtain the second order, the same may be obtained by the vendors on motion (*y*), which is of course, and if made specially will be refused with costs (*z*); but can be made only on a seal day (*a*). If the purchaser be supposed to be incompetent in point of means, the vendors may move, on notice, that he be discharged, and that the estate be resold (*b*); or, as is now the more usual and more eligible course, to obtain an order, not that the purchaser be discharged, but that the estate be resold, and that he may pay the expenses arising from his non-completion of the purchase, the expenses of the application to the Court, and of the resale, and any deficiency in price on the resale (*c*).

If supposed
to be re-
sponsible.

If the purchaser is responsible, the vendors may move that within a given time he pay his money into Court; if he appear on the motion he is *primâ facie* entitled to have the title referred to the Master; and, if he do not appear, it seems to be requisite that the vendors shall have delivered the abstract, and procured the Master's report in favour of the title (*d*); or that the purchaser shall have accepted the title (*e*): where defendants to the

(*w*) See Dan. Ch. P. by H. 1205; Anst. 344; Dan. Ch. P. by H. 1206; Sug. 71.

(*x*) *Ibid.*

(*y*) *Chillingworth v. Chillingworth*, 1 Sim. 291; *Lidbetter v. Smith*, 5 Beav. 377; *Roberts v. Williams*, 2 Ha. 151.

(*z*) *Robertson v. Skelton*, 10 Beav. 197.

(*a*) *Ibid.* 199.

(*b*) *Hodder v. Ruffin*, 1 V. & B. 544; *Cunningham v. Williams*, 2

(*c*) *Harding v. Harding*, 4 Myl. & Cr. 514; *Saunders v. Gray*, *ibid.* 515; *Gray v. Gray*, 1 Beav. 199.

(*d*) Dan. Ch. P. by H. 1207, and cases cited; and see *Bulmer v. Alison*, 8 Jur. 440, V. C. W.; 15 L. J., N. S., 11 Ch.

(*e*) *Rutter v. Marriott*, 10 Beav. 33.

suit who were entitled with the plaintiff to shares in the estate, purchased a part of it of which they were in possession, and the conditions precluded any objection to the title, they were ordered to pay in the *entire* purchase-money, although they claimed allowances for improvements and the estate was incumbered (*f*).

On the other hand, where the contract is inequitable (*g*), or where to enforce it would be attended with great hardship, as in the case of a sudden and violent change in the money market (*h*), or where the purchaser has by mistake given an unreasonable price for the estate (*i*) and is expeditious in applying to the Court (*k*), he will, according to some authorities, be allowed to forfeit his deposit (if any), and abandon the contract: but this will not be conceded on the mere ground of the price being excessive (*l*), nor in the case of a person without authority buying the estate to prevent a sale at an undervalue (*m*); nor, it is conceived, under any ordinary state of circumstances.

Purchaser, whether allowed to forfeit deposit and abandon contract.

- | | |
|--|--|
| (<i>f</i>) <i>Bulmer v. Allison</i> , 15 L. J., N. S., Ch. 11., L. C. | but with disapprobation, Sug. 90. |
| (<i>g</i>) Sug. 89. | (<i>k</i>) See <i>Price v. North</i> , 2 Y. & C. 620, 626. |
| (<i>h</i>) <i>Savile v. Savile</i> , 1 P. Wms. 745; <i>sed quære</i> . | (<i>l</i>) <i>In re Birch</i> , cited Sug. 89. |
| (<i>i</i>) <i>Morshead v. Frederick</i> , cited, | (<i>m</i>) <i>Nelthorpe v. Pennyman</i> , 14 Ves. 517. |

INDEX.

[When Chapters, or several consecutive pages, are referred to, see
Table of Contents.]

ABANDONMENT.

- Of parol agreement, letter suggesting, is no contract, 99.
- Of contract—purchaser in possession not liable for use and occupation, 119.
 - in vendor's lifetime—its effect on rights of his representatives, 123.
 - in purchaser's lifetime, its effect, &c., 125.
 - entitles vendor to have abstract returned, 130.
 - by assignees of bankrupt purchaser, 465.
 - by purchaser from the Court, whether allowable, 573.
- Of possession by husband and wife, of her estate, 194.
- Of vendor's lien for purchase-money, what amounts to, 346,
et seq.
- Of objection to title by purchaser, its effect on costs, 544.

ABATEMENT.

- Of rent, agreement for, must be in writing, 96.
- Of price, for misdescription, 54.
 - when claimable for defects in estate, 307, *et seq.*
 - vendor when compelled to convey estate, on being allowed, 499, *et seq.*
 - purchaser unsuccessfully claiming in suit, pays costs, when, 545.
- Of incumbrances, obtained by purchasing partner, enures to benefit of firm, 434.

ABSENCE.

- Of husband, may prove illegitimacy, 170.
- Without tidings, raises presumption of death, 172.

ABSOLUTE.

- Interest contracted for, purchaser need not take redeemable, 504.

ABSTRACT.

- In conditions, means "perfect abstract," 58.
- When perfect, what it must contain and show, 131 to 134.
- Purchaser's right to, and right to retain, 130.
- Condition restricting, when expedient, 58.
- Vendor pays for, except on sale to railway company, &c., 130.
- Condition *contra*, mortgagee may sell under, 77.
- What must be furnished in various cases, 134 to 140.
- Effect of condition for its commencement with specified document, 68.
- Condition respecting, how to be framed, if early title lost or defective, 68.
- Production of, prior to sale, when expedient, 69.
- As to its preparation, contents, and delivery, 140 to 147.
- On sale by Court, 562, 567.
- Condition for delivery of, 57.
- How waived in Equity, 213, *et seq.*
- Delivery of, cannot supply want of written contract, 99, 478.
- But must precede application for payment of purchase-money into Court, on sale under decree, 572.
- Non-delivery of, its effect on conditions as to time, &c., 58, 72.
- Or on condition as to interest, 300, *et seq.*
- Long retention of, without objection, a waiver of title, 531.
- As to its examination and perusal, 147 to 149.
- expenses of, when recoverable by purchaser, 147, 446.
- Master proceeds on, on reference of title, 522.
- As to its verification, 69, 149 to 200.
- Must be verified, although deeds not to be produced, 67.
- Should be verified at vendor's expense, on sale in lots, 70, 77.
- Erroneous, purchaser reselling on faith of, yet not allowed damages for loss of bargain, 447.
- Must be returned if contract finally abandoned, 130.

ABSTRACTION.

- Of part of subject-matter of contract, *pendente lite*, 534.

ACCEPTANCE.

- Of lease by assignees in bankruptcy, 37.
- Payment by, to agent of vendor, when valid, 87.
- Of right of pre-emption, 98, n. (g).
- Of offer, by post, 101, 105.
- Of offer, binding if not conditional, 104.
- Conditional, its effect, 104.
- Of abstract, after time fixed for delivery, when inexpedient, 146.
- Of title shown by abstract, its effect, 149.
- Subject to removal of specified objection, its effect, 217, 521.

ACCEPTANCE—*continued*.

Subject to removal of specified objection, its effect, 217, 521.

Not always required of purchaser moving to pay purchase-money into Court, 564.

And see WAIVER.

ACCESS.

Doctrine as to, as respects illegitimacy, 170.

ACCESSION.

In correspondence, by both parties to same terms, is an agreement, 104.

ACCIDENTAL.

Loss or improvement after contract is borne or taken by purchaser, 116 to 118.

Omission of parcels from conveyance, 383.

ACCOMMODATION WORKS.

Should be referred to in agreement for sale to railway company, 97.

ACCOUNT.

Of profits, &c., how taken, if sale to trustee, &c., set aside, 23, 24.

When sale set aside as fraudulent against vendor, 222, 358.

Or as fraudulent against purchaser, 380.

How taken against vendor, delaying to show title, 293.

Against purchaser evicted under paramount title in Equity, 426.

Against purchaser, not obtainable under prayer for general relief, 472.

Of rents, &c., decree for specific performance should direct, 534.

Settlement of, with agent, when equivalent to payment to vendor, 87, 310.

ACCRUER.

Of title. *See* STATUTE OF LIMITATIONS.

ACCRUING.

Benefit after contract—purchaser entitled to, 116 to 118.

ACCURACY.

Of particulars, material, 51.

ACKNOWLEDGMENT.

Of title, equivalent to possession, within 3 & 4 Will. IV. c. 74, 192.

What amounts to, *ib.*, n. (e).

Its effect between mortgagor and mortgagee, 196.

By married women, search for, 243.

ACKNOWLEDGMENT—*continued.*

Mode of taking, and practice respecting, 269, *et seq.*

Until made, vendor's liability to discharge incumbrances continues, 282.

Vendor pays for, 334.

ACQUIESCENCE.

In purchase, binds infant attaining majority, 10.

Or married woman becoming *sui juris*, 12.

In voidable purchase by trustee, &c., binds *cestuis que trust*, 25.

How distinguishable from confirmation, 26.

Bars vendor's right to set aside fraudulent sale, 359.

In purchase, or expenditure by purchaser, binds adverse claimants, 394, 395.

In expenditure by railway company, held to bind landowner, 480.

Purchaser when not bound by, to accept bad title, 531.

ACRE.

Statutory and customary, 303, *et seq.*

Estate presumptively sold by, if quantity stated, 307.

ACT.

Private, copy of, should accompany abstract, 145.

How to be proved, 150.

Is not notice, although declared public, 409.

Affecting property, should be noticed in particulars, 53.

But local public Act need not be noticed, *ib.*

Being notice to all the world, 406.

ACTS.

Meaning of, in covenants for title, 368.

Of ownership by purchaser, when an acceptance of title, 220.

Of purchaser, what will rebut presumption of advancement, 439.

Of vendor, may avoid contract, 515.

ACTION.

Against vendor, for concealment or misrepresentation, 40, 44, 45.

Against solicitor misrepresenting title, 42.

Against stranger misrepresenting property, 45.

Against purchaser or stranger for slander of title, 46, 47.

Against auctioneer selling without authority, 80.

For deposit, if purchase go off, 82.

By auctioneer against party for whom he acts as agent, 83.

On cheque for deposit, 88.

In respect of performance of parol agreement, 93.

Or of transfer of parol agreement, *ib.*

Not for collateral matter mixed up with void parol agreement, 96.

ACTION—*continued*.

For mortgage debt, not restrained, though mortgagor have agreed to sell estate, 128.

For recovery of land, &c. *See* STATUTE OF LIMITATIONS.

Of ejectment against purchaser rejecting title, 221.

For use and occupation against purchaser, 119, 222, 448.
by purchaser, 223.

By vendor upon purchaser's covenants, 360, *et seq.*

By purchaser upon vendor's covenants, 363, *et seq.*

For rents, &c., by purchaser of reversion, 386.

Purchaser when liable to, for nuisance, 430.

For breach of contract, Ch. XVII. *passim*, 443.

Inability to recover damages in, when a defence in Equity, 496.

Damages recovered in, a defence in Equity, 516.

For title deeds by purchaser under decree, restrained, 570.

Costs of, in suit for specific performance, 547.

ACTUARY.

Opinion of, no test of value of reversionary interests, 357.

ADDITION.

By parol to written agreement, inadmissible at Law, 451.

Or on behalf of plaintiff in Equity, 483.

When admissible as a defence in equity, 484, *et seq.*

ADITS, MINING.

Law respecting, 184.

ADMINISTRATION.

Letters of, received as evidence of death, 168.

Suit, its effect on power of trustees for sale, and executors, 29.
damages for breach of covenant, claimable as debt in,
376.

as is vendor's claim under decree for unpaid purchase-money, 535.

ADMINISTRATOR.

Cannot buy intestate's personal estate, 17.

May adopt contract entered into by agent before grant of letters of administration, 86.

Time runs against, from death of intestate, 189.

Assignment by, before administration, void, 275.

See PERSONAL REPRESENTATIVES.

ADMITTANCE.

To copyholds, should in abstract be preceded by surrender, 141.

Costs of, who pays for, 335.

Customary heir may sue as such before, 374.

ADOPTED.

Child, purchase in name of, an advancement, 437.

ADOPTION.

Of act of unauthorized agent, 86.

By widow of husband's contract for sale, 464.

ADVANCE.

Of price, what required on opening biddings, 556.

of biddings not opened for, after confirmation, 560.

ADVANCEMENT.

When purchase is held to be, 437, *et seq.*

ADVANTAGES.

Concealment or disclosure of, by purchaser, 46.

Legally incidental to, are presumed to accompany property, 51.

Obtained by partner enure to benefit of co-partner, 434.

ADVENTITIOUS VALUE.

Destruction of matters conferring, relieves purchaser from contract, 116, 223.

Want of title to part of property possessing, a defence in Equity, 505.

ADVENTURE.

Property purchased as, does not survive in Equity, 433.

ADVERSE INTEREST.

Parties having, prior to contract, not proper parties to suit, 466.

ADVERSE CLAIMS. *See* CLAIMS.

ADVERTISEMENT.

Of sale by fiduciary vendors, proper, 33.

Of sales by the Court, 553.

ADULTERY.

Of wife, yet issue legitimate, 169.

ADVOWSON.

Title to, must be accepted by purchaser claiming to present to vacancy, 117.

Must be carried back, over what period, 139.

Right to recover, when barred by time, 197.

How affected by judgments, 231, 235.

Purchaser of, restrained from presenting, before payment, 519.

AGENCY.

Denied, may be established, 84.

Alleged agent may be examined to disprove, 106.

AGENT.

- For purchase, may not sell his own estate to principal, 7.
- Fiduciary vendor may not act as, 15.
- For sale or management, cannot purchase, *ib.*
- Of mortgagee, cannot purchase from him under power of sale, 17.
- Of fiduciary vendor, cannot himself purchase, 18.
- For sale, should sell when practicable, 27.
 - how he ought to sell, 31 to 35.
 - for what price he should sell, 35 to 37.
- General points respecting sales by, 37, 38.
- As to his appointment, powers, duties, liabilities, and remuneration, 83 to 87.
- Payments to, when valid, 87, 310.
- Signature of agreement by, binds principal, 91.
- How agent should sign, 85, 107.
- Alleged agent may be examined to disprove agency, 106.
- Acknowledgment of title by, binds principal, 192.
- Principal bound by fraud of, 380, 454, n.
- And by notice to, 402, 412.
- Whether within the rule as to professional communications, 414.
- May sue and be sued on contract, when, 444.
- No damages in Equity against person falsely contracting as, 459.
- When to be a party to suit for specific performance, 467.
- Improvident contract by, not enforced in Equity, 491.

AGISTMENT.

- Parol agreement for, valid, 95.

AGREEMENT.

- Not to bid at auction, valid, 47.
- For sale of land, what it comprises, 51, 52.
- In writing, generally necessary under Statute of Frauds, 91 to 96.
- The preparation of formal agreements, 96, 97.
- What informal documents may constitute agreement, 97 to 105.
- Signature to, 105 to 108.
- Stamps on, 109 to 111. (*a*)
- As to illegal agreements, 111 to 113.
- When to be recited, 254.
- To pay interest, effect of, 298.
- To take rents, &c., excludes claim to interest, 302.
- In conveyance for lease, no additional stamp, 332.
- Voidable, purchaser whether bound by notice of, 416, *et seq.*
- To use property as in trade, bars survivorship, 433.

(*a*) p. 110, for 10th read 11th Oct.

AGREEMENT—*continued*.

Respecting joint purchases, 434.

Remedies at Law and in Equity for breach of, Ch. XVII. and XVIII.

Production of, when compelled at Law, 453.

And see CONTRACT.

ALIEN.

Incapacity of, to hold land, present law respecting, 8, 9.

Naturalization of, 9.

No lien on land, presumed in favour of, 350.

ALIENATION.

Married woman, though absolute owner, may be restrained from, 5.

Of charity lands, when valid, 7, 571 n.

Of tenant for life's estate, effect of, on his power to consent to sale, 35, n.

Champerty, what amounts to, 112.

Of purchaser's interest under contract, allowable, 115.

As to restrictions on general right of. *See* Ch. I. pp. 1 to 7.

ALIENEES.

Of purchaser or vendor, may enforce specific performance, 461.

Of vendor, specific performance when enforced against, 462, 469.

ALLOTMENT.

Condition to be used, on sale of, 74.

What abstract of title to, requisite, 134 to 136.

Held under several titles, steward's fees, 335.

Unascertained, sale of, at inadequate price enforced, 511.

ALLOWANCE.

To vendor or purchaser, when sale set aside. *See* ACCOUNTS.

ALTERATION.

Of property, by infant purchaser, its effect, 11.

Or by married woman, 13.

Of time fixed for sale by author of trust, inadmissible, 30.

Of advertized mode of sale, should be advertized, 33.

Of printed particulars, &c., by auctioneer, 50.

Of signed agreement, destroys rights of altering party, 108, 455.

Of property by vendor, discharges purchaser, 116, 223.

Of property by purchaser, its effect, 220, 223, 381.

In approved draft conveyance, should be mentioned, 267.

Of deed, whether fresh stamps necessary, 333.

AMBIGUITY.

- In written agreement, fatal, if patent, 102.
- Parol evidence, when admissible to explain, 451.
- A ground of defence in Equity, 485.

AMBIGUOUS RECITAL.

- Not notice, 411.

ANCESTORS.

- Vendor covenants against acts of, when, 371.
- Purchase in name of, no advancement, 438.

ANCIENT DEEDS.

- Not to be abstracted, 140.
- but must be given up on completion, 314.
- Attested copies of, cannot be required, 66, 316.
- Proof of execution of original, unnecessary, 152.

ANCIENT DEMESNE.

- Land held in, whether within the 1 & 2 Vict. c. 110, 237.

ANNUITY.

- Contract for purchase of, from infant, a misdemeanor, 3.
- For sale of, when enforced after death of annuitant, 117, 511, 512.
- Arrears of, for how long recoverable, 188, 189, n. (o).
- Secured on land, is bound by registered judgment, 237, 238.
- Searches for, whether requisite, 243.
- Estate sold for, no *ad valorem* duty, 256, 327.
- Charged on land, estate must be sold subject to, unless annuitant concur, 291.
- Unless there is a trust to pay debts, 284.
- Vendor's lien, when the estate is sold for, 348, 349.
- Covenant for payment of, he can require, 266.
- Whether inadequacy of, as a consideration, may be shown, 354.
- Release of, supports settlement otherwise voluntary, 423.
- Purchaser of, from Court, when entitled to, 567.

ANSWER.

- Incumbrancer, &c., bound by, on inquiry as to claim, 42.
- Whether he need make, 43, 228.
- Admission of parol agreement in, by defendant, 482.

ANTICIPATION.

- Of time, fixed by author of trust, for sale, improper, 30, 571.

APPARENT AGENT.

- Acts of, may bind, 84.

APPEAL.

- Pending, yet Master settles conveyance, 536.
- Money repaid on, does not bear interest, 538, 548.

APPLICATION.

- Of purchase money, when purchaser bound to see to, 283 *et seq.*
- Mode of, on sale by Court, 564.

APPOINTMENT.

- Of agent, how to be made, 83.
- Deed of, in abstract, should be preceded by deed creating power, 141.
- Defeated judgment, under old law, 233.
- Sed aliter*, under new law, 234.
- Except as respects purchasers without notice, 241.
- To be registered in County Register, 319.
- Effect of, on prior covenants for title, 361, 364.
- By covenantor, person claiming under, claims under him, 368.

APPORTIONMENT.

- Of rent, condition for, on sale of reversion, 60.
- Of rent, &c., conditions for, on sale of leaseholds in lots, 76.
- Of consideration, on purchase of copyholds and other property, 255.
 - to avoid higher duty, *ib.*
- None, of damages for breach of covenants for title, between tenant for life and remainderman, 377.
- Act, does not apply between vendor and purchaser, 386.

APPROPRIATION.

- Of purchase-money, and notice given, saves interest, 293.
- When justifiable, 294, 298, 301.
- What amounts to, 297, 298.
- Its effect if incumbrance discovered, 382.

APPROVAL.

- Of draft, when equivalent to agreement, 107.
- Of title, by counsel, does not bind client, 149, 217.

ARBITRATION BOND.

- May amount to an agreement, 98.

ARBITRATOR.

- Cannot purchase claims of parties to reference, 16.

ARGUMENTATIVE REPLIES.

- To objections to title, whether a waiver of conditions as to time, &c., 72.

ARREARS.

Of periodical payments, what recoverable, 198.

ARTICLES.

Marriage, post-nuptial settlement is notice of, 407.

ASSENT.

Purchaser's, to investment of deposit, necessary, to bind him, 88.

To contract, party bound may require other party to signify, or to reject, 105.

ASSESSMENT.

To land-tax, evidence of occupancy, 167.

ASSETS.

When marshalled for vendor's lien, 346.

Heir or devisee liable in action to extent of, 376.

ASSIGNEES.

Of Bankrupt or Insolvent, their rights to his after-acquired property, 13, 14.

Selling, cannot purchase the estate, 16.

As to time for sale by, 28.

As to mode of sale by, 32 to 35.

As to the price, 35 to 37.

As to their general liabilities, 37, 38.

Of bankrupt purchaser, may take to or abandon contract, 120.

Contract by, to sell lease, fixes them as assignees thereof, 129.

Of bankrupt, covenant by, to produce deeds, how qualified, 263.

Of purchase-money, his rights and liabilities, 282, 346, 381, 461.

Of insolvent, not asserting rights for nineteen years, yet not postponed, 396.

Of bankrupt or insolvent vendor, purchaser how protected against, 396.

may enforce and are bound by contract for sale, 461, 462.

Of bankrupt purchaser, may elect, 465.

Of vendor's or purchaser's interest under contract, who proper parties to suits by or against, 469, 470.

ASSIGNMENT.

Of lease for less than three years, parol agreement for, void, 92.

Of parol agreement, when a good consideration, 93.

Of terms for years, when presumed, 160.

What requisite, if incumbrance kept on foot, 248.

What to be entered in County Register, 318.

Of lease, agreement for, how not performed, 504, 506.

ASSURANCE.

By infants, lunatics, and married women, whether void or voidable, 1 to 5.

Further. *See* COVENANTS FOR TITLE.

Further, purchaser's right to, in Equity, 382, *et seq.*

ATTAINDER.

What it is, and its effect, 6.

ATTENTION.

From defect in estate, vendor must not divert, 40.

ATTESTATION.

Of registration memorial, what sufficient, 319, *et seq.*

ATTESTED COPIES.

Purchaser's right to, 314, *et seq.*, 570.

Of deeds, when evidence, 152.

Of documents produced as negative evidence, purchaser not entitled to, 166.

ATTESTING WITNESS.

Signature as, not a signature within Statute of Frauds, 107.

Whether proof of deeds by, can be required, 151.

Whether affected with notice of contents of deed, 411.

ATTORNEY. *See* SOLICITOR.

Surrender made or deed executed by, power to be produced, and what evidence, &c., required, 151, 152.

Receipt under power of, when insufficient, 292.

Conveyance by, by infant or married woman, void, 2, 269.

Vendor must not convey by, *ib.*

ATTORNMENT.

Not necessary to enable purchaser to proceed for rent, &c., 387, 430.

AUCTION.

What it is, 80.

Purchase at, by fiduciary vendor, voidable, 15.

Authority to sell by, does not justify private sale, 31.

Fiduciary vendors, whether bound to sell by, 32.

Agreement not to bid at, valid, 47, 490, n.

Sales by, are within Statute of Frauds, 91, 482.

Agreement on sale by, refers to particulars, &c., 96.

Bond fide sale by, fixes value of estate, 357, 510.

Estates are generally sold by, by the Court, 549.

AUCTION DUTY.

Repealed (by 8 Vict. c. 15,) 482, n. (o).

Payment of, was not a part performance, 482.

AUCTIONEER.

Cannot buy the estate, 16.

Verbal declarations by, at sale, their effect, 50, 486.

His liabilities, power, and remuneration, 80 to 83, 553.

Authority of, revocable before sale, 83.

Loss by insolvency of, falls on vendor, 89.

Entry by, in sale book binds either party, 98.

But the name of other party must appear, or auctioneer must be personally bound, 100.

When and why a party to suit for specific performance, 468.

Who appointed, on sale by Court, 551.

AUSTRALIA.

Lands in, generally conveyed by feoffment, 257.

AWARD,

Conditions respecting, 74.

Want of enrolment of, supplied by statute, *ib.* n.

When evidence of requisition of Acts being complied with, 135, 136.

Agreement that title shall commence with, 136.

How proved, 150.

BAILIFF.

Purchaser of infant's estate, chargeable as, 427.

BANK.

Payment into, on sale by statutory vendors, 311.

BANKING ACCOUNT.

Payment into, whether an appropriation, 297, 298.

BANKRUPT.

Cannot make a title against his assignees, 6.

After-acquired property of, vests in assignees, when, 13.

Estate of, may not be bought by assignee, 16.

How to be sold. *See* ASSIGNEES.

Contract for sale of his estate, exempt from stamp duty, 110.

Whether to be a party to conveyance of his estate, 250.

And see BANKRUPTCY, and ASSIGNEES.

BANKRUPTCY.

Sales in, are within Statute of Frauds, 91, 482.

Biddings in, may be opened, 36.

Of either party does not determine contract, 120.

BANKRUPTCY—*continued*.

Of purchaser, deposit set off against deficiency on re-sale, 73.

Proceedings in, how proved, 156.

Effect of, on rights of judgment creditor, 232, 236.

Orders in, have the effect of judgments, 238.

Purchase-money how paid, on sale in, 311.

Commission in, not in itself notice, 410.

Certificate in, whether a defence to action on covenants, 375, 376, n.

And see BANKRUPT, and ASSIGNEES.

BAPTISM.

Of child as legitimate, raises presumption of marriage, 171.

Certificate of, not evidence of time or order of birth, 176.

BARGAIN.

No damages generally, for loss of, 447.

BASE FEE.

When enlarged into fee simple by 3 & 4 Will. IV. c. 74, 195.

Created before passing of the Act, is protected, 196.

BEDFORD LEVEL.

Register of conveyances of land in, 320.

BENEFIT.

Party may consent to sale for his own, 30, 35.

Happening to estate after contract, is taken by purchaser, 116.

Rule respecting, on purchase under decree, 566.

When purchaser claiming, must accept title, 117.

BIBLE.

Entries in, evidence of pedigree, 178.

BIDDER.

At auction, to protect property, allowable in Equity, 89.

But not at Law; *semble*, except by stipulation, 51, 89.

Buying-in wrong lot, specific performance not enforced against, 90.

BIDDING.

Reserved, when allowable, 51, 89.

special order for, requisite, on sale by Court, 552.

May be retracted before fall of hammer, if no condition against 57.

Whether such a condition is valid, *ib.*

Agreement not to oppose, is legal, 47, 490.

By agent beyond authorized amount, its effect, 84.

See OPENING BIDDINGS.

BILL.

- In administration suit, its effect on power of executors, 29.
- For specific performance, dismissed, return of deposit when ordered, 88, 538.
- Of costs, delivery and taxation of, 340, *et seq.*
- For specific performance, form of, 470, *et seq.*
 - filing, binds plaintiff to parol contract, 494.
 - not dismissed for want of prosecution, pending reference, 522.
 - dismissal of, 529, 530.

BILL OF EXCHANGE.

- Should not be given to agent, &c., for purchase-money, 87.
- Taking for purchase-money, does not affect vendor's lien, 347.

BIRTH.

- Evidence of, 176 to 178.

BISHOP.

- Purchase by, of annuity charged on rectory, set aside, 16.
- Sale of lease by, freehold title not to be required, 75, 137.
- Restrained from presenting or collating, pending suit, 519.

BLANK.

- Left for signature at foot of agreement, its effect, 107.

BLIND AND DEAF PERSON.

- Notice to, whether valid, 34, n.

BOND.

- Of reference, may constitute agreement, 98.
- By Railway Companies, on entry before payment, 225.
- Taking for purchase-money, whether it affects vendor's lien, 347, *et seq.*
- For quiet enjoyment, cannot be required as a "further assurance," 370.
- Agreement in shape of, specific performance of enforced, 496.

BOOK.

- Entries in, when evidence of pedigree, 178.

BREACH.

- Of covenant. *See* COVENANT.
- Of contract. *See* CONTRACT.
- Of agreement by tenant, when vendor may sue for after conveyance, 387.
- Of trust, what amounts to confirmation of, 26.
- Trustee of legal estate, liable for facilitating, 38.
- When use of special conditions amounts to, 76.

BREACH—*continued*.

- Of trust, and inability to give receipts for purchase-money, distinguished, 288.
- vendor's lien affected by, 350.
- purchaser when affected by notice of, 410.
- lands purchased in, *cestuis que trust* may claim, 442.
- agreement amounting to, not enforced in Equity, 490.

BRICK-BUILT.

- What is, 56.

BUILDINGS.

- Pulled down, how valued in taking accounts, 23.
- Ruinous state of, a patent defect, 40.
- Removed, to be referred to in sale of lease, 54.
- Covenants respecting erection of, 360, 362.

BUILDING LAND.

- Plan of intended improvements, on sale of, 55.
- Adjoining land stated to be, effect of, *ib*.
- Land sold as, and rights of way, &c., concealed, 64.

BURIAL.

- Certificate of, how far evidence of time of death, 176.

BUYING IN.

- Estate by fiduciary vendors, their liability, 37.

CASE.

- For opinion of counsel, whether to be produced, 165, 415.
- Is not evidence of pedigree, 178.
- On title, not sent to Law, unless purchaser consent, 523.
- As to costs of, 547.

CAUTION.

- Purchaser not bound to use excessive, 412.

CERTIFICATE.

- Of births, marriages, and deaths, evidence, 176.
- Of burial, whether purchaser can require, *ib*.
- Of acknowledgment by married woman, 270.
- Costs of, 334.
- In bankruptcy, whether a defence to action on covenant, 375.

CESTUI QUE TRUST.

- Right of, to impeach purchase by trustee, &c., 21 to 26.
- Under express trust, when barred by 3 & 4 Will. IV. c. 27, 190.
- Mortgagor not to be deemed such, 191.
- Trustee whether barred by possession of, *ib*.

CESTUI QUE TRUST—*continued*.

Specific performance, when enforced against, 462.

When not necessary party to suit, 469.

CESTUI QUE VIE.

Death of, before conveyance, on purchase in consideration of life annuity, 117, 118.

CHAMPERTY.

What is, 111 to 113.

CHANCEL.

Liability to repair, does not admit of compensation, 52, 506.

CHANGE.

Of solicitors, not notice of change of interest, 412.

CHARACTER.

In which actual notice is acquired, immaterial, 402.

CHARGE. *See* INCUMBRANCE.

CHARITY.

Lands, alienation of, when valid, 7, 571, n.; *and see Att.-Gen. v. Pilgrim*, 14 Jur. 1053.

Governor of, lease to, of the lands, invalid, 17.

Lands, exchange of, double title to be shown on sale, 136.

Trusts for, whether within 3 & 4 Will. IV. c. 27, 190.

Conveyance to, must be enrolled in Chancery, 320.

As to notice, in cases of, 394, 425.

Voluntary conveyance to, is irrevocable, 420.

CHARTER.

Ancient, parcels in, proved by modern usage, 167.

CHATTELS.

Agreement for sale of, when valid, 94.

Passing by delivery, not to be included in conveyance, 255.

Real, of wife, husband's power over, 5, 273, 464.

CHEQUE.

Action on, for deposit, when defensible, 88.

For purchase-money, when not a payment, 310.

CHILD.

Of trustee, purchase by, valid, 20.

Purchase in name of, when an advancement, 437, *et seq.*

And parent, contracts between, when valid, 356, n. (x).

CHIROGRAPH.

Evidence of Fine, 154.

CHOSSES IN ACTION.

Rules as to, do not apply to equitable estates in land, 393.

CHURCHWARDENS.

When a corporation to purchase land, 8.

Regularity of appointment of, presumed, 168, n.

CIRCUMSTANCES.

Of parties to contract, evidence of, when admissible, 452.

CLAIM.

Party supposed to have, on estate, should be applied to, 42.

Notice of, not followed by proceedings, its effect, 164, 526.

Moneys paid to compromise, when recoverable, 375.

Notice of, its effect, 407, *et seq.*

Particulars of, to be delivered in action, 456.

As to proceeding by, under Orders of April, 1850, 473, *et seq.*

Adverse, by persons not parties to suit, decree does not bar, 533.

Against moral equity, its effect on costs, 541.

And see INCUMBRANCES.

CLASS.

Unincorporated, cannot purchase, 8.

More favoured as respects *laches* than individuals, 25.

CLEAR YEARLY RENT.

What is, 56.

CLERK.

Of auctioneer is agent of both parties, 82.

Of agent cannot bind principal, 87.

Of solicitor, &c., may not disclose professional communications, 414.

Master's, deposit not paid to, on sale by Court, 592.

CLIENT. *See* SOLICITOR.

CODICIL.

must be produced, on sale by devisee under will, 165.

COHABITATION.

May raise presumption of marriage, 171.

If illicit, presumably continues so, *ib.*

COLLATERAL.

Relations, as to limitations to, in settlements, 421, *et seq.*

Securities, mortgagee selling, after foreclosure, cannot resort to, 430.

COLLIERY.

As to opening biddings on sale of, 557.

Purchaser of, from Court, when entitled to profits, 566.

COLONIES.

Modes of conveyance in, 257, n.

COMMENCEMENT.

Of title, conditions as to, 67, 68.

what is a sufficient, 138 to 140.

Of suit, what is, 188, n.

COMMENDATION.

Of estate by vendor, what allowable, 43 to 45.

COMMISSION.

Auctioneer filing bill of interpleader, cannot claim out of deposit, 81.

Auctioneer's right to, 82.

Broker's, allowed, among costs of re-investment, 337, n.

COMMISSIONER.

Of bankrupts, cannot buy the estate, 17.

For inclosure, cannot buy lands in parish, *ib.*

Regularity of appointment of, presumed, 161, 168.

For tithe commutation, power of, 135, 181.

COMMITTEE.

Of lunatic, may set aside conveyance by, 3.

May convey, under statute, 4.

Cannot purchase or rent the estate, 17.

Specific performance enforced by and against, 461, 462, 464.

Of lunatic vendor, purchase-money to be paid to, 537. *See*

FIDUCIARY CHARACTER and STATUTORY OWNERS.

COMMONS INCLOSURE ACT.

Title to lands held under, 136.

COMMON.

Liability to right of, does not admit of compensation, 52, 506.

But purchaser may elect to take subject to, with compensation, 503.

Rights of, title to under Prescription Act, 184 to 188.

Title to limited instead of unlimited right of, admits of compensation, 508.

Right of, unlikely to be enforced, held immaterial, 526, *sed qu.*

COMMON.

Tenant in, possession of one does not save rights of others under 3 & 4 Will. IV. c. 27, 192.

Buying of another, entitled to abstracts of general title, 134.

COMMUTATION.

Of tithe, 181.

COMPENSATION.

- Defects &c. not admitting of, avoid contract if undisclosed, 52.
- Condition respecting, 62.
- May be used by mortgagee, 77.
- What matters do not admit of, 63 to 65.
- Fiduciary vendors cannot allow, 65.
- Purchaser when entitled to defective estate, with, 71, 499, *et seq.*
- Waiver of title, not always waiver of, 221.
- To landowners, for severance, &c., not liable to stamp duty, 257.
- For breach of contract, whether purchaser bound to pay interest during delay in showing title, can claim, 300, *et seq.*
- Vendor's or purchaser's right to, for difference in quantity, 304, *et seq.*
- Purchaser's right to, for deficiency in quality, 309.
- For personal inconvenience, &c., when allowed to statutory vendor, 312.
- For misstated rental, allowed to purchaser from the Court, after conveyance, 571.
- And see* ABATEMENT and PURCHASE-MONEY.

COMPLETION.

- Conditions should fix time for, 58.
- Relative rights of vendor and purchaser until, 115 to 121.
- Death of vendor before, relative rights of his representatives, 121 to 124.
- Death of purchaser before—relative rights of his representatives, 125 to 128.

COMPOSITION.

- For tithe—Commissioners may decide on validity of, 181.
- How otherwise proved, 182.

COMPROMISE.

- When purchaser can recover from vendor, moneys paid for, 375.
- By Court, in respect of costs, 542.

COMPULSORY POWERS.

- Of Railway Companies—time for exercise of, 28.
- Second notice may be given under, 118.
- Notice under, to what extent a contract, 98, 122.

CONCEALED.

- Fraud, time does not run during, 190, 427.

CONCEALMENT.

- Of defects, &c., by vendor, 39 to 43, 530.
- Of advantages, &c., by purchaser, 46.

CONCEALMENT—*continued.*

- Of claim by incumbrancer, &c., 228, 395.
- Inadequacy of consideration, resulting from, its effect, 353, 510.
- Contract procured by, equity will not enforce, 492.

CONCURRENCE.

- Of husband, in conveyance by wife, when dispensed with, 273.
- Of necessary party in settlement, a good consideration, 420.
- Of others, vendor when required to procure, 498.

CONDITIONS.

- Subsequent or precedent, as affecting trusts for and powers of sale, 30, 31.
- Purchaser of reversion, his rights in respect of breach of, 386.
- Mutual, in contract, whether independent, 450.

CONDITIONS OF SALE.

- Depreciatory, should not be used by fiduciary vendors, 34.
- General construction of, 48 to 51.
- Against retracting biddings, 57.
- As to deposit, *ib.*
- For delivery of abstract, *ib.*
- Restrictive of purchaser's right to abstract, 58.
- As to time for completion, and interest, 58 to 60.
- For preparation and execution of conveyance, 60.
- For apportionment of rent, *ib.*
- As to crops, fixtures, and timber, 61.
- As to misdescriptions, and for compensation, 62 to 65.
- As to deeds and attested copies, 65, 66.
- Restrictive of purchaser's right to title and evidence, 66 to 68.
- As to identity, 69.
- Stringent conditions not favoured, *ib.*
- As to expenses, 70.
- As to indemnity against charges, &c., *ib.*
- As to time for objections, &c., 70 to 72.
- As to resale, and forfeiture of deposit, 73, *and see* 451.
- Matters of fact stated in, must be proved, 73.
- Special, what generally required in various cases, 74 to 76.
- Use of special, by fiduciary vendors, 76 to 78.
- Effect of express power to sell under special, 78.
- What objections respecting, are objections to title for purpose of reference, 520.
- What usually omitted, on sale by Court, 552.

CONDITIONAL POWERS AND TRUSTS.

- As to sales under, 30.

CONDUCT.

- Of parties, evidence of illegitimacy, 170.
- Whether admissible as evidence against advancement, 439.

CONFIRMATION.

- Of alien's title, by Crown, 9.
- Of voidable purchase by trustees, &c., 26.
- Of void exchanges, by Tithe Commutation Commissioners, 135, n.
- Deed of, recitals of objections in, 254.
 - not liable to *ad valorem* duty, 330.
- Voluntary, of sale by reversioner, when invalid, 355.
- Advised, of purchase at undervalue, bars relief, 359.
- Of Master's report on sale by Court, purchaser's rights, &c., before, 554, *et seq.*
 - how obtained, 559.
 - effect of, 560.

CONSENT.

- To sale, by party thereby benefited, valid, 30, 35.
- General, to sale, whether sufficient, 34.
- Of parties agreeing to join in sale, should be in writing, 132.
- When insufficient, 132.
- To inclosure and exchanges under inclosure Acts, as to proof of, 135, 136.
- Of protector, to disentailing assurance, 321, 322.
 - deed of, vendor pays for, 334.
- Of trustees, tenant for life contracting to sell without, 495.

CONSIDERATION.

- Incapacitated vendors or purchasers impeaching sale, must restore, 3, 4, 6, 11, 12.
- Fiduciary vendors may sell, for what, 35, 36.
- On sale of reversion, condition, on re-sale, against requiring evidence of its sufficiency, 76.
- Cannot be sued for as such, on parol contract, 93.
- Transfer of parol contract, when a good, *ib.*
- Statement of in conveyance, 254, *et seq.*
- What duty payable on, and on what, 254, *et seq.*; 326, *et seq.*
- No part of to be retained by statutory vendor, 311.
- What sufficient to support settlement, 420, *et seq.*
- Purchaser for, how protected in equity. See Ch. XV.
- Inadequacy of, when conveyance set aside for, 354, *et seq.*
- Inadequacy or excess of, a defence in equity, 510, *et seq.*
 - a ground for refusing costs, 543.

CONSTRUCTION.

- Of particulars and conditions of sale, 48 to 51.
- Of doubtful instrument, purchaser whether bound to notice, 404.
- Of agreement, case of plaintiff insisting on his own, 533.

CONTINGENT.

- Interests in real estate, married woman can convey, 275.
- Interests in copyholds, are now alienable, 324.
- Event, as to vendor's lien for purchase-money payable on, 347, *et seq.*
- Reversion, as to inadequacy of consideration paid for, 355.
- Estates, owners of, when parties to suit, 469.
- Amount of consideration, effect of, on question of inadequacy, 511.
- Consideration, failure of, its effect, 117, 512.

CONTRACT.

- As to restrictions on general power to enter into, 1 to 14.
- Fiduciary vendors may not without special authority rescind, 37.
- Condition for rescinding, how far available, 71, 72.
- By agent, 85.
- As to contracts in writing, *see* AGREEMENT.
- Effect of, on relative rights of parties, 114 to 129.
- Purchaser entitled to estate, and vendor to money, 114.
- Purchaser's general rights under, against vendor, 115 to 118.
- Vendor's general rights under, against purchaser, 118 to 120.
- Rights of parties, under *inter se*, not affected by death, bankruptcy, &c., 120.
- Relative rights under, of vendor's real and personal representatives, if he die before completion, 121 to 124.
- And of purchaser's, if he die, &c., 125 to 128.
- Effect of contract in various special cases, 128, 129.
- Purchaser's right to rescind on notice, for delay, 212, *et seq.*
- By tenant in tail, cannot be enforced against issue or remaindermen, 394, 463.
- For purchase or sale, remedies at law for breach of, Ch. XVII. remedy in Equity, &c., Ch. XVIII.
- Plaintiff rescinding after bill filed, no costs given, 542.

CONTRIBUTION.

- To paramount charges, 428.
- Suit for by joint purchaser, 434.

CONVERSION. *See* CONTRACT.

CONVEYANCE.

- Common condition respecting, whether necessary, 60.
- Requisition that stranger shall join in, an objection to title within common condition for rescinding contract, 72.
- Rights of parties, before, *see* CONTRACT.
- Approval of draft of, whether an agreement, 107.
- Memorandum of transfer of chattels, when subject to duty as, 111.
- Of legal estate, under statute, 121, 277, *et seq.*, 537, *et seq.*, and 569.
- To purchaser, when it revokes prior devise, 127.
- Incumbrances, considered matters of, in Equity, 133.
- Preparation of, whether waiver of title, 218.
- As to the preparation of generally, Ch. XII.
- As to its execution, &c., 269, *et seq.*
- As to its registration, enrolment, &c., 317, *et seq.*
- As to the stamps, 325, *et seq.*
- As to the costs of, 334, *et seq.*
- Its effect on relative rights of vendor and purchaser, Ch. XIV.
 - On adverse rights of third parties, Ch. XV.
- Rights under, of joint purchasers, &c., Ch. XVI.
- Costs of, whether recoverable at Law, 446.
- Plaintiff at Law, whether bound to tender or execute, 449, 450.
- Refusal to execute, no defence to action on security for purchase-money, 451.
- Giving instructions for, not a part performance, 478.
- Execution of, by vendor, not a part performance, 482.
- Of property by vendor, *pendente lite*, when restrained, 518.
- Preparation and execution of, in suit for specific performance, 535, *et seq.*
 - and in sales by the Court, 567, *et seq.*

CONVEYANCER.

- Certificated, whether he may prove notice to client, 414.

COPARCENER.

- Possession of one, does not save others' right of action, 192.
- Estate of, how affected by judgment, 231.

COPPICE.

- Vendor in possession may cut, for benefit of purchaser, 116, 515.
- Improper cutting of, by purchaser, restrained, *semble*, 119.

COPIES.

- Condition that purchaser shall pay for, mortgagee may use, 77.
- Of deeds, or enrolments of deeds, when evidence, 152, 153.
- Of recoveries, Crown grants, legal proceedings, &c., 154 to 156.

COPIES—*continued.*

- Office, usually received in evidence, 156.
 - Certified, of records, under 1 & 2 Vict. c. 94, *ib.*
 - Of will when are received, 157.
 - Of records, under 3 & 4 Will. IV. c. 74; and 1 & 2 Vict. c. 94, 155, 156.
 - Of instruments on record, vendor must verify abstract by, 202.
 - Covenant for right to take, of documents not delivered, 263.
 - Purchaser's right to, on completion, 314, *et seq.*, 570.
 - Copy of agreement, production of, when ordered at Law, 453.
- And see* ATTESTED COPIES.

COPIES OF COURT ROLL.

- Evidence, although not the original copies, 150.
 - Examined copies evidence, *ib.*
 - Steward to deliver out, stamped, 330.
- And see* COPIES.

COPYHOLD.

- Customary restriction on alienation of, in parcels, removed, 7, n.
- Quit rents, &c., need not be noticed on sale of, 53.
- Vague description of, on Court rolls, sufficient, 69.
- Enfranchised, conditions proper on sale of, 74.
- Formerly waste, conditions, &c., 75.
- Subsequently surrendered to use of, would pass by prior will, 127.
- Sixty years' title to be abstracted, on sale of, 138.
- Assurances of, how proved, 150, 151.
- Surrender of, presumed, 159.
- Not extendable on a judgment under old law, 231.
- Aliter* under 1 & 2 Vict. c. 110, 233, *et seq.*
- Not extendible by Crown process, 241 [*sed aliter* as respects a term for years in copyholds; see *Prid. on Judg.* 3rd edit. 155].
- Court rolls should be searched on purchase of, 242.
- Not within the merger of Satisfied Terms Act, 248.
- Consideration to be apportioned, on purchase of, with other property, 255.
- Vendor must surrender, in person, 269.
- Assurance of, by married women, 272.
 - under the Trustee Act, 1850, 279.
 - by tenant in tail, 321.
- Entry of assurances on Court Rolls, 323.
 - on sale to Railway Companies, &c., 324.
- Contingent interests in, are now alienable, *ib.*

COPYHOLD—*continued*.

- Expenses how borne, on sale of, 335.
- Covenants will run with, 365.
- Conveyance of, under private Act, effect of, 429, n.
- Purchaser need not take, instead of freehold, 504.

CORNWALL.

- Duchy of,—evidence of deeds relating to, 153, n.

CORPORATION.

- Cannot hold lands without a license, &c., 8.
- Municipal, can sell under Lands C. C. Act, 1845, with consent of Treasury, 37.
- On sale of lease granted by, freehold title must be shown, 137.
- Modus, on exemption from tithe, how proved against, 182.
- How affected by 3 & 4 Will. IV. c. 27, 188, 197.

CORRESPONDENCE.

- May constitute agreement for sale, &c., 97, 98.
- Test of its sufficiency as an agreement, 104.

COSTS.

- Fiduciary vendor, obtaining leave to purchase trust estate must pay, *semble*, 22.
- Of application that mortgagee may bid in bankruptcy, 18, n.
- Fiduciary vendor purchasing, pays, if sale set aside, 24.
- Fiduciary vendors liable to, as against purchaser, 38.
- Of auctioneer, when allowed out of deposit, 81.
- Of abstract, 130, 131.
- Of production of deeds, 201.
- Incurred by vendor before fatal objection by purchaser, 216, 542.
- Landowner has no lien for, on sum deposited by Railway Company, 225.
- Of unnecessary searches, disallowed, 244.
- Vendor's solicitor has no lien for, on conveyance, 267.
- Of the purchase, generally, 334, *et seq.*
- Of statutory vendors, 336.
- Of re-investment, &c., what payable by Railway Companies, 337, *et seq.*
- Taxation of, under 6 & 7 Vict. c. 73, 340, *et seq.*
- Whether purchaser allowed, if conveyance set aside for inadequacy of consideration, 358.
- Paid by purchaser to adverse claimant, when recoverable under covenants for title, 375.
- Of ejected purchaser, recoverable under covenants for title, 377.
- Purchaser allowed, if sale set aside for fraud in vendor, 380.

COSTS—*continued.*

What not recoverable in action at Law, 446.

General rules respecting, in suits for specific performance, 539,
et seq.

On sales by the Court, 558, 559, 560, 563, 565, 567, 572.

COUNSEL.

May not buy up charges on client's estates, 17.

Opinion of on abstract, purchaser's right to, if contract go off,
130.

As to consulting, on abstract, for vendor, 145.

Or on behalf of purchaser, 147.

Acceptance of defective title by, does not bind client, 149, 217.

Confidential communications to, as to non-disclosure of, 165,
414, *et seq.*

Usually directs what searches, 230.

Notice to, is notice to client, 412, *et seq.*

But his evidence is inadmissible in proof of notice, 414.

Opinion of, is taken by Master, on title, and conveyance, 523,
536.

Opinion of, does not save costs, 540.

COURT.

Payment into, of purchase-money, under sales by statutory
owners, its investment and application, 312.

Sales under order of, Ch. XIX.

COURT ROLLS.

To be searched on purchase of copyholds, 242.

Assignees omitting to enter their title on, yet not postponed,
396.

If not searched are not notice, 410.

COVENANTS.

Unusual in lease, notice of lease is notice of, 53.

In lease, deceptive statement respecting, fatal, *ib.* 54.

Should not be referred to as "usual," 75.

Evidence of performance of, condition as to, *ib.*

How affected, if lessor purchase underlease, 129.

What should be inserted in conveyance, 258, *et seq.*

Conveyance in consideration of, whether vendor's lien exists,
347, *et seq.*

Vendor's remedies on purchaser's, 360, *et seq.*

Purchaser's remedies on vendor's, 363, *et seq.*

By lessee, who may sue on after sale of reversion, 386.

By *A.* and *B.*, relative values of, Court will not determine,
418, *n.*, 502, *n.*

To indemnify husband, a consideration for separation deed, 420.

COVENANTS—*continued*.

To settle land, purchase when a performance of, 442, n.

Unexpected liability to, a defence to specific performance, 507.

COVENANTS FOR TITLE.

Fiduciary vendors covenant only against incumbrances, 37.

Except under special circumstances, 261, 262.

Condition respecting, usual, 78.

What entered into by vendor, in various cases, 258, *et seq.*

Breach of, what amounts to, and purchaser's remedies, 366, *et seq.*

For further assurance, purchaser's remedy under in equity, 383
et seq.

Purchase-money when applicable in discharge of incumbrances covered by, 381, 390.

COVENANT FOR PRODUCTION.

Of deeds not delivered, purchaser's right to, 65, 158, 263, 316.

When to be entered into by separate deed, 263.

When to be made determinable on parting with deeds and procuring substituted covenant, *ib.*

To prior covenantees, purchaser taking deeds must enter into, 265, 314.

Whether to be required under covenant for further assurance, 370.

COVERTURE.

No excuse for participation in fraud, 228. *See* MARRIED WOMAN.

Estate of husband during, bound by judgments, 231.

CREDITOR.

Of bankrupt, advising on sale, cannot purchase, 17.

Execution, may buy the estate, 19.

Under composition deed, not bound by majority to voidable sale, 21.

Single, may compel sale of bankrupt's estate, 28.

Creditors of insolvent, direct time, mode, and place of sale, 32.

Letters to, when not sufficient agreement within Statute of Frauds, 99.

Of purchaser, by judgment, his rights against vendor before completion, 115.

Judgment, when necessary parties to conveyance, 250.

Vendor's lien for purchase-money is valid against, 345.

Conveyance in trust for creditors, when voluntary, 420, 424.

What conveyances fraudulent against, 426.

CROPS.

- Condition as to payment for, 61.
- Growing, written agreement for sale or purchase of, when necessary, 93 to 95.
- Who entitled to, until time fixed for completion, 115.
- Vendor may get in, pending completion, 116, 515.

CROWN.

- Rights of, against estates of traitors and felons, 6, 13.
- or of aliens, 8, 9.
- Grant from, to be abstracted, on sale of estate held under, 139.
- how proved, 155.
- vendor stating place of enrolment of, need not produce, 202.
- of advowson, presumed, 159.
- Title acquired against, by adverse possession, 200.
- Process, what estates are liable to, 242. *See* COPYHOLDS.
- Protection against debts to, under 2 Vict. c. 11, 241, 399.
- Gives no covenants, 262.
- Right of, as respects mines, 527, n.

CULTIVATION.

- Compensation claimable, for state of, misdescribed, 309.
- or for deterioration through want of, 306.

CURTESY.

- Estate by the, subject to judgments, 231.

CUSTODY.

- Of deeds—condition as to, 66.
- “Proper,” what is, 152, n.
- Of deeds of settled estate, right to, 201, n.

CUSTOM.

- Universal, conditions not to be read so as to contravene, 48.
- Manorial, or local, need not be noticed in particulars, 53.
- That steward shall prepare surrenders, valid, 245.
- Negating doctrine of resulting trusts, is bad, 436.
- Evidence of, when admissible to explain agreement, 452.

CUSTOMARY FREEHOLDS.

- Whether subject to judgments under old law, 231.
- Are subject to judgments under new law, 235, *et seq.*
- Are not within Merger of Satisfied Terms Act, 248.
- And 3 & 4 Will. IV. c. 74, s. 53, does not apply to, 322.
- As to assurances of, 257, n.

CUSTOMARY HEIR.

- May sue on covenants for title before admittance, 374.

CUSTOMARY.

Measurements abolished, 303.

DAMAGES.

What recoverable for breach of covenants for title, 374.

When claimable as a debt in administration suit, 376.

Not apportioned between tenant for life and remainderman, 377.

What recoverable at Law for breach of contract, 445, *et seq.*

Recovery of in prior action, a defence at Law and in Equity, 455, 516.

Not recoverable in equity for breach of contract, 459.

Presumed inadequacy of, the ground for decreeing specific performance, *ib.*

Inability to recover at Law, when a defence in Equity, 496.

By abstraction of subject of contract *pendente lite*, ascertained by action, 534.

And see ACTION.

DEAN AND CHAPTER.

Sale of lease granted by, whether freehold title must be produced, 137.

On sales by, time is of essence of the contract, 209.

DEATH.

Of life tenant, must be disclosed in dealing with reversioner, 46.

Of life tenant, *cestui que vie*, or annuitant, pending contract, its effect, 116 to 118, 511.

Of either party, contract not affected by, 120.

Of purchaser, intestate and without heir, before completion, vendor may retain estate and purchase-money, 119.

Of vendor, before completion, relative rights of his real and personal representatives, 121 to 124.

Of purchaser, before, &c., relative rights of his, &c., 125 to 128.

Presumption of, and as to time of, 172 to 174.

Without issue, 174 to 176.

Evidence of, 176 to 180.

Of vendor or purchaser, who may sue and be sued for breach of contract, 448.

for specific performance in Equity, 461, 462.

Of husband, effect of, on his contract to sell wife's chattels real, 464.

Of purchaser under decree, effect of, 555.

DEBT.

From vendor's agent to purchaser may not be discharged out of purchase-money, 87.

DEBT—*continued.*

Purchase-money is a, from purchaser, 114; *and see* 535.

Mortgage, mortgagee need not receive before time fixed for redemption, 276; *see* 568.

Trust to pay debts, purchaser when bound to see performed, 284, *et seq.*

Charge of debts in will, equivalent to trust for sale, 291.

Statutes making real estate assets for payment, do not amount to charge of, 292.

Purchaser from heir or devisee need not see to payment of, *ib.*

When subject to *ad valorem* duty, on conveyance, 326.

Damages, when claimable as, in administration suit, 376.

DECEPTIVE PLAN OR STATEMENT.

Avoids what would otherwise be notice of defects in estate, 54.

DECISION.

At Law, Equity will not overrule, but direct a case, 525.

Of Court below, does not in Appellate Court render title doubtful, *ib.*

Reported, bill filed on authority of, may be dismissed without costs, 543.

DECLARATION.

Verbal, at time of sale, effect of, 49, 50.

Statutory by vendor, not evidence in support of title, 166.

By members of family, evidence in matters of pedigree, 177.

By strangers, not generally evidence of pedigree, yet acted on by conveyancers, 175, 177.

Must be made *ante litem motam*, 179.

May be made by party in like interest, 180.

Of identity, should accompany extracts from Registers, 176.

Of trust, and agreements, distinguished, 435.

What admissible, to rebut presumption of advancement, 439.

DECREE.

Sale under, not within Statute of Frauds, 91, 555.

For payment, has the effect of a judgment, 238, 535.

Is not notice, 410.

Form of, in suit for specific performance, 532, *et seq.*

Does not affect persons not parties to suit, 533.

Reversed, no interest allowed on money paid under, 538, 548.

Sales under, Ch. XIX.

DEDUCTION.

Of title by abstract, should be in regular order, 142.

DEEDS.

- Vendor must produce all, but need not state defects apparent thereon, 41.
- Condition respecting production, and copies of, 65, 66.
- Loss of, its effect on title, 65, 145.
- Examination of, with abstract, 147.
- Proof of, 151 to 154.
- Presumption of, 159, 160.
- Presumption of formalities relating to, 161.
- Production of, Ch. IX., and *see* COVENANT FOR PRODUCTION.
- Purchaser's right to, and to copies of, &c., on completion, 314, *et seq.*
- Not protected at Law by vendor's lien for purchase-money, 345.
- Omission to ask for, its effect as regards priority, 345, 395, *et seq.*
- Notice of, as affecting property, is notice of entire contents, 404, 407, *et seq.*
- Attesting witness, not affected with notice of contents of, 411.
- Not produced, unless required in reference of title, 522.
- But Master may call for, if necessary, *ib.*
- Burnt after contract, and title therefore bad, yet bill dismissed with costs, 540.
- Purchaser's right to, on sale by Court, 569.

DEFAMATION.

- Of title, when action lies for, 46.

DEFAULT.

- Condition that purchaser making default shall pay interest, 59, 299.
- Rents receivable but for, account when extended to, 294, 306, 358, 427.
- Wilful, what is, 299, n.
- Meaning of, in covenants for title, 369.

DEFECTS.

- Patent and latent, what are, 39, 40.
- Disclosure or concealment of by vendor, 39 to 43.
- In title, how to be guarded against by conditions, 68.
- What not included in acceptance of title, 149.
- In client's title, not to be disclosed to client entitled to take advantage thereof, *ib.*
- Known, in title, as to covenants against, 262, 369.
- In estate, abatement of purchase-money in respect of, 307, *et seq.*
 - when a defence against specific performance, 497, *et seq.*

DEFECTS—*continued*.

In estate or title, after conveyance, purchaser's general remedies for, depend on vendor's covenants, 363, *et seq.*

In title, what damages recoverable for, if no eviction, 374.

purchaser's equitable remedy for, under special circumstances, 378, *et seq.*

when a defence against specific performance, 498 to 510, 523, *et seq.*

In execution of power, when supplied in Equity, 394.

In fines and recoveries, and sales of land tax, supplied by statute, 399.

DEFENCE.

Grounds of, in Law, admitting the agreement, 454.

Equity, against specific performance, except with variation, 484 to 488.

negating *in toto* plaintiff's right to specific performance, 488 to 516.

Frivolous, may be disposed of on motion, *semble*, 520.

Nature of, its effect on costs, 540, *et seq.*, 545.

DEFICIENCY.

In personal estate, as to sales to make good, 289.

In quantity or quality of estate, compensation for, 307 to 309.

In rental, compensation for, to purchaser from Court, after conveyance, 571.

DELAY.

By infant, to impeach voidable purchase, bars relief, 10.

Or by *cestui que trust*, to impeach purchase by trustee, 25.

Or by vendor to impeach sale at undervalue, 359.

In payment of purchase-money, condition as to interest, 59.

And see INTEREST.

In delivery of abstract, effect of, 58, 146.

In Post Office, party sending letter not responsible for, 101.

Waiver of, 213, 214.

In completion, payment of interest in cases of, 293, *et seq.*

Effect of express agreement to pay interest during, 298, *et seq.*

In showing title, &c., fatal at Law, 456.

In filing bill, a defence in equity, 514.

Reference of title before hearing, refused on ground of, 521.

Held not to be a ground for forcing clearly bad title on purchaser, 531.

Bill dismissed on ground of, dismissed without costs, 542.

And see TIME.

DELEGATION.

Of sale by auctioneer, inadmissible, 80.

DELIVERY.

- Of abstract, condition respecting, 57, 58.
 - neglect in, its effect, 146.
 - waiver of, 213, 214.
- Of deeds by mortgagee to mortgagor, does not affect priorities, 395.
- Of particulars of claim in action, 456.

DEMAND.

- Constant, of title, modifies what would otherwise be waiver, 221.
- Right of defendant to stop suit, on submitting to, 545.

DENIAL.

- Of claim on estate, binds the party, 42.

DENIZATION.

- Effect of, 9.

DENOMINATION.

- Erroneous, stamps of, when sufficient, 333.

DENOTING STAMP.

- May be affixed, in certain cases, 329, 330.

DEPENDENT.

- Stipulations in agreement, what are, 449, *et seq.*

DEPOSIT.

- Condition for payment and investment of, 57.
- For forfeiture of, 73, 88.
- Purchaser cannot elect to forfeit, and avoid contract, 87.
- Except, perhaps, under special circumstances, on sale by Court, 573.
- Auctioneer cannot receive more than, 81.
- When allowed his charges out of, *ib.*
- His liability in respect of, *ib.*
- As to payment, investment, and forfeiture of, 87, 88.
- Receipt for, may constitute agreement, 98.
- Vendor rescinding contract need not return, nor need purchaser rescinding sue for, 212.
- What to be made by railway companies before entry, 224, *et seq.*
- Of deeds on completion for joint benefit of parties, 315, 570.
- Equitable mortgage by, prevails against subsequent judgment, 237.
- Of deeds, notice of, is notice of lien of deposittee, 408.
- On purchase-money, purchaser's right to recover at Law, 444, *et seq.*, 451.

DEPOSIT—*continued*.

Action for, when not restrained in Equity, 446, 456, 518.

Return of, when decreed in Equity, 88, 538.

Cannot be set off against costs, 547.

Not usually required, on sale by Court, 552.

When required, how to be paid, 553.

What required, on opening biddings, 558.

DEPRECIATORY.

Remarks, &c. by purchaser, their effect, 46.

Conditions on sale by fiduciary vendors, what are, 76 to 78.

DESCENT.

If recent, proof of ancestor's intestacy required, 165.

Of person last entitled having been the stock of, presumption as to, 168, 169.

DESCRIPTION.

Of property in particulars, matters to be attended to in, 51 to 56.

Inconsistent, not provided for by usual condition as to identity, 69.

Vague, of copyhold, sufficient, *Id*.

General, of estate, sufficient in agreement, 101.

Specific, of documents referred to in agreement, not essential, 103.

Of party, cannot amount to a signature, 106.

DESTRUCTION.

Of deeds, effect of, on title, 142.

liability of mortgagee for, 205.

Of conveyance, vendor must execute duplicate, 371.

Accidental, of property, purchaser bears, when, 117, 498, 554, 560.

DETERIORATION.

Trustee, &c. purchasing is liable for, if sale set aside, 23.

Accidental, after contract, is borne by purchaser, 116, 498, 560.
See 554.

To estate, through fault of vendor, effect of, 306, 307.

DETERMINABLE.

Interest, when sold, should be so described, 52.

Character of the property, may make time essential, 209.

Interest, purchaser of from Court bears loss of, before confirmation, 555.

DEVISE.

By vendor, how affected by contract for sale, 121 to 124.

By purchaser, how affected, &c., 126 to 128, 387.

General, not sufficient root of title, 141.

DEVISEE. *See* DEVISE.

Purchaser from, must see to payment of legacies, but not of debts, 292.

Selling, must produce any subsequent will or codicil, 165.

Conveyance from, under the Trustee Act, 277, *et seq.* 537.

May sue on covenants for title, when, 374.

Liability of, on ancestor's covenants, 376.

May set aside settlement actually fraudulent, 424.

When party to suit for specific performance, 469.

DIFFICULTY.

Of ascertaining compensation, a ground for refusing specific performance, 502, n. (*p*).

DIGNITIES.

Judgments affect estates granted in support of, 231.

DILAPIDATIONS.

Generally admit of, and give right to, compensation, 63, n. (*e*), 309.

DIMENSIONS.

Of property, misstated, purchaser can claim abatement, though the occupying tenant, 54.

DIMINUTION.

Of purchase-money, grounds for, 306, *et seq.*

DIRECTION.

To pay purchase money to stranger, when irrevocable, 86.

In decree for specific performance, what inserted, 534, *et seq.*

DIRECTORS.

Of public company, their power to contract, 108.

DISABILITY.

Persons under, enabled to convey by statute, 6.

See STATUTORY OWNERS, *and* STATUTE OF LIMITATIONS.

DISCHARGE.

For purchase-money, trustees, &c., when able to give sufficient, 283, *et seq.*

Of incumbrances, on completion, and under Lands Clauses Consolidation Act, 1845, 281 to 283.

by purchaser out of unpaid purchase-money, 381.

Of purchaser, on report against title, 530.

Of purchaser from Court, if biddings opened, 559.

DISCLAIMER.

By married woman, of interests in real estate, 275.

By assignees of insolvent purchaser, estate decreed to belong to vendor, 465.

What sufficient to save costs, 546.

DISCLOSURE.

Of defects, &c., by vendor, 39 to 43.

Of advantages, &c., by purchaser, 46.

Of defects in client's title to client entitled to take advantage of, improper, 149.

DISCONTINUANCE.

Of user, is not an interruption, within Prescription Act, 187.

DISCRETION.

Trusts involving, purchaser need not see performed, 285.

DISENTAILING.

Deeds, when to be searched for, 243.

Should be distinct from conveyance, 247.

Recitals in, generally unnecessary, 253.

Enrolment of, 321.

Costs of enrolment, 334.

DISMISSAL.

Of bill, return of deposit, when decreed, 88, 538.

Does not generally prejudice right of action, 456, 539.

For want of prosecution, pending reference, irregular, 522.

Without giving judgment on exceptions, 529.

On motion, on report against title, and no exceptions, 530.

DISPUTE.

Agreement to accept title without, is binding, 68.

DISQUALIFIED.

Persons, no lien presumed in favour of, 350.

DISSENT.

From voidable purchase by infant, when to be expressed, 10.

DISTRESS.

Conveyance obtained from person in, when set aside, 353, *et seq.*

Agreement obtained from person in, when not enforced, 510.

And see POVERTY.

DISTRESS FOR RENT.

Purchaser's right to make, after conveyance, 386, 430.

DISTRIBUTION.

Of purchase-money, on sale by court, 564.

DISTURBANCE.

What is a, within covenants for title, 367.

DIVISION.

Of estate, effect of, in prior covenants for title, 366.

DOCKETING.

Of judgments, 232.

Dockets closed by 2 & 3 Vict. c. 11, 239.

DOCUMENTS.

Conditions as to production, custody, or furnishing copies of, 65 to 68.

Loss of, how guarded against, in conditions, 68.

What may constitute agreement, within Statute of Frauds, 97 to 105.

Abstract should commence with, if practicable, 140.

What a sufficient root of title, 140 to 142.

As to abstracting, 142 to 145.

When to be produced as negative evidence, though not part of the title, 158.

But purchaser cannot require copies of such, 166.

Deficiencies in proof of, how far supplied by presumption, 159, 161.

Production of, Chap. IX.

And see DEEDS, ATTESTED COPIES.

DOUBTFUL.

Document, abstract should not commence with, 140, 142.

Title, purchaser need not accept, 523, 562.

What is, 524, *et seq.*

Construction of executory instrument, whether purchaser need notice, 404.

DOWER.

Conveyance to uses to bar, for purchaser, a revocation of prior devise, when, 127.

Of after-taken wife, was barred by contract for sale, 129.

Arrears of, how long recoverable, 198.

Purchaser when entitled to concurrence of wife or dowress, 251.

Conveyance to uses to bar, still usual, 257.

Satisfied term, when a protection against, 252.

Release of, a sufficient consideration for settlement, 420.

Specific performance not enforced against wife entitled to, 462.

DRAFT.

Agreement or conveyance, approval of, whether a sufficient signature, 107.

DRAFT—*continued*.

- Conveyance, preparation of, when a waiver of title, 218.
- Alterations in, should be communicated, 267.
- Of proposed further assurance, should be submitted to vendor, &c., 371.
- Notice of, not notice of executed deed, 411.
- Conveyance, practice respecting, when Master settles, 536.

DROPPING.

- Of life. *See* DEATH.

DURESS.

- A defence at Law, 454.
- And in Equity, 492.

DUTIES.

- Relative, of vendor and purchaser prior to sale, 39 to 47.
- And see* STAMPS.

EASEMENT.

- When not a matter for compensation, 64, 506.
- Can be granted only by deed, 92.
- Grant of, when presumed, 160.
- Title to, under Prescription Act, 184 to 188.

EAST INDIES.

- Land in, how conveyed, 257, n.

EDUCATION.

- Infants, &c., may convey for purposes of, 2.

EJECTMENT.

- Without compensation, of purchaser rejecting title, 221.
- Of tenants by vendor, compensation for, 307.
- Costs of, allowed, as damages under covenants for title, 377.
- Of purchaser, a defence against specific performance, 515.
- Of tenant claiming right of purchase, when restrained, 518.

ELECTION.

- By infant purchaser, on attaining majority, 10.
- Party bound by contract, may require other party to make his, 105.
- By purchaser, under optional contract, effect of, on vendor's representatives, 122, 124.
- By vendor, under, &c., effect of on purchaser's representative, 126.
- Heir of purchaser, when put to his, *ib*.
- By vendor, of remedies for purchase-money, 351.
- In cases of apparent advancement, 440.
- By plaintiff at Law and in Equity, 351, 456.

ELECTION—*continued*.

By assignees of bankrupt purchaser, 465.

By purchaser, to take defective title, 533.

ELECTION.

Parliamentary, *bond fide* purchase, for purpose of voting at, legal, 113.

ELEGIT. *See* JUDGMENT.

Does not affect prior equitable mortgage, 398.

EMBLEMENTS.

Parol agreement for sale of crops which would go as, valid, 94.

ENCOURAGEMENT.

By adverse claimant of purchase, &c., 394, 395.

ENCROACHMENT.

By lessee, lessor's right to, 200, n.

ENFRANCHISED COPYHOLDS.

Title to be shown to; condition respecting, 74, 137.

ENFRANCHISEMENT.

Presumed, 160.

ENJOYMENT.

Absolute, of estate, matter affecting, should be stated, 52.

Of estate, matter materially affecting, avoids contract, 64, 506.

Subsequent, of manor, whether to be proved on sale of enfranchised land, 75, 137.

or of reversion, on sale of lease, 138.

Evidence of, when a sufficient root of title, 142.

May raise presumption of existence of documents, &c., 159, 160.

Confers title under Prescription Act, when, 184 to 188.

ENLARGEMENT.

Of time for completion, in Equity and at Law, 213, 456, 488.

Of bare fee, by subsequent enrolled assurance, 385.

ENROLMENT.

Of proceedings in bankruptcy, when to be required, 156.

Of deeds, when evidence thereof, 152, 153, n.

Under Statute of Charitable Uses, 320.

Of disentailing assurances, 321, *et seq.*

costs of, vendor pays, 334.

ENTRY.

By auctioneer in sale book, binds parties, 83, 98.

Subject to what qualification, 100.

ENTRY—*continued.*

- In books, when evidence of pedigree, 177.
- On lands, by Railway Companies, before completion, 224, *et seq.*
- Power of, in conveyance of minerals, 266.
- On Court rolls, of disentailing assurances, 322.
 - of assurances generally, statutory provisions for, 323, 324.
- By purchaser of reversion, for condition broken, 386.
- Right of, by strangers, a defect in title, 506.

EQUITABLE ESTATE.

- Trustees for sale of, can call for conveyance of legal estate, 38.
- In land, purchaser of, acquires no priority, by notice to owner of legal estate, 43, 229, 393.
- Contract for purchase, not equivalent to conveyance of, 115.
- Nature of purchaser's, under contract, *ib.*
- Same length of title to be shown to, as to legal, 140.
- Instruments only affecting, as to abstracting, 143 to 145.
- How affected by judgments, 231, 232, 235, *et seq.*
- Purchaser of, is entitled to a conveyance, when, 245, 461.

EQUITABLE TITLE.

- Purchaser's, without notice, legal estate protects, 389, *et seq.*
- Mere, is postponed to prior equities, 392, *et seq.*
- Registered, yet subsequently registered legal title prevails, 400.
- Purchaser need not accept, 523.
- Unless he purchase from the Court, 562.

EQUITY.

- Court of, cannot generally sell infant's estate, 2, 570.
- Proof of proceedings in, 155, 156.
- And Law, election between, 351, 456.
- Suit in, a disturbance, 367.

EQUITY OF REDEMPTION.

- Mortgagee may buy from mortgagor, 18.
- When barred under 3 & 4 Will. IV. c. 27, 196.
- Purchase of, an investment not sanctioned by Court, 313.
- Notice to be given to mortgagee, on purchase of, 325.

EQUITIES.

- Under contract, cannot before conveyance be enforced against stranger, 115, 388.

EQUIVOCAL.

- Terms of agreement, a reason for refusing costs, 543.

ERROR.

- In decree for sale, effect of, 570.
- Whether purchaser need wait to have, rectified, 562.

ESCHEAT.

Follows on attainder, 6.

Of trust or mortgage estates, provision against, 281.

ESTATE.

Is bound by contract of trustee for, or donee of power of, sale, 114.

Case of purchaser buying his own, 382.

ESTATE TAIL.

Remainders expectant on, when barred under 3 & 4 Will. IV. c. 27, 194 to 197.

Enrolment, &c., of assurances to bar, 321, *et seq.*

Barred by fraud, remedy of remainderman, 358.

ESTIMATION.

Quantity stated, described as being by, 308.

ESTOPPEL.

Whether any, by recital of vendor's title, 253.

Not by doubtful recital, 385.

EVIDENCE.

Copies of deeds, when admissible in, 65.

Conditions restricting purchaser's right to, 66 to 70.

what necessary in various cases, 74 to 76.

Called for within limited time, objections on, 72.

Whether purchaser precluded from, may require information, 73.

Of existence and genuineness of abstracted documents, what necessary or admissible, 150 to 158.

Deficiencies in, when supplied by presumption, 159 to 162.

May be required, of what facts in title, not documentary, 162 to 166.

Deficiencies in, when supplied by presumption, 166 to 176.

Ordinary, of material facts, 176 to 183.

Defects in, how far remedied by Statutes of Prescription and Limitation, 183 to 200.

Unnecessary, danger of requiring, 216.

Deed, not properly stamped, is inadmissible as, 325.

Of vendor's intention to abandon lien, what sufficient, 350.

Of intention, cannot, at Law, cut down parcels, 352.

Of professional adviser, cannot prove notice, 414.

Parol, payment of consideration, provable by, against nominal purchaser, 436.

may prove apparent conveyance, a mortgage, 437.

What will rebut presumption of advancement, 438.

EVIDENCE—*continued*.

- Parol, may rebut presumption of resulting trust, 441.
- What will prove application of trust money, 441.
- Parol, agreement how affected by, 102, 451, *et seq.*, 476, *et seq.*, and 484, *et seq.*
- Master may receive and require what, on reference, 523.
- Necessary, refusal to furnish, its effect on costs, 542.

EXAMINATION.

- Of abstract with deeds, expenses of, 70, 201.
 - may be made before taking opinion on title, 147, 202.
 - matters to be observed in, 206.
- Of parties, by Master, on reference of title, 522.

EXCEPTIONS.

- To Master's Report in favour of title, proceedings on, 528, 529.
 - against title, &c. 530.
- Lie to Master's certificate of approval of draft, 537.

EXCESS.

- In quantity, whether vendor can claim compensation for, 303, *et seq.*
- Not after conveyance, 351.
- Of purchase money, whether a purchaser's defence, 512.
 - no ground for discharging purchaser under decree, 573.

EXCHANGE.

- Title to estates held under, 135, 136.

EXECUTION.

- Alteration of agreement after, 108.
- Alteration of conveyance after, stamps how affected by, 333.
- Of title deeds, when vendor must prove, 65, 151, 152.
- Of conveyance, 269, *et seq.*, 537, *et seq.*, 568.
- Vendor pays for, 334.
- Defective, of power, when relieved against, in Equity, 394.

EXECUTOR.

- Cannot buy testator's estate, 17.
- Whether he can sell, after bill filed for administration, 29.
- Acting as auctioneer, cannot charge commission, 82.
- Probate Act Book, proves appointment of, 157.
- Assignment of term, by one of several executors, or before probate, valid, 275.
- Can give good discharges, unless purchaser has notice of breach of trust, 285, 288.
- Of vendor, purchase money should be paid to, 290.

EXECUTOR—*continued.*

Not allowed to bid, on sale in administration suit, 551.

Of lessee, entitled to indemnity from purchaser, 567.

And see REPRESENTATIVES and FIDUCIARY CHARACTER.

EXECUTORY INSTRUMENT.

Doubtful, or voidable, purchaser how far bound by notice of, 404, 416.

EXEMPLIFICATION.

Evidence of Fine or Recovery, 154.

EXEMPTION.

From tithe, how shown, 181 to 183.

EXPENDITURE.

In improvements, purchaser when allowed, in account, 23, 221, 380, 426.

When recoverable at Law by purchaser, 375, 446.

Purchaser when protected in Equity, against persons encouraging, 395.

By joint-purchaser, he has a lien for, when, 434.

When a part performance, in Equity, 477 to 480.

EXPENSES.

Usually borne by vendor, condition for payment of by purchaser, 70.

May be used by fiduciary vendor, *semble*, 77, 78.

Of purchaser, to be provided for on sale to railway company, 97.

Of producing and inspecting deeds, 201.

Prior to contract, whether railway companies need pay, 336.

What recoverable by purchaser, in action at Law, 446.

Of sale by Court, 553.

What allowed to first purchaser, if biddings opened, 558.

And see COSTS and EXPENDITURE.

EXPLANATION.

Of suspicious circumstances, or adverse notice, 164.

EXTINGUISHMENT.

Of charges, on purchase by incumbrancer, 442, n.

EXTRACTS.

Official, of Fines and Recoveries, not strictly evidence, 154.

From parochial and general registers, how far evidence, 176, 177.

FACT.

Material to title, and not apparent on the deeds, vendor must disclose, 41.

False statement of, what, by vendor, may avoid contract, 44.

FACT—*continued*.

- Increasing value of property, purchaser need not disclose, 46.
- Aliter*, if it increase vendor's interest in property, *ib*.
- Matters of, stated in conditions, must be proved, 73.
- Instrument produced simply to establish, need not be abstracted, 142.
- Matters of, what to be proved in support of title, 162 to 166.
- Deficiencies in evidence of, supplied by presumption, 166 to 176.
- How ordinarily proved, 176 to 180.

FAILURE.

- Of issue, how proved, 174, 175.
- Of contingent consideration, before completion, 117, 511, 512, 555.
- Of subject-matter of contract, yet account directed in Equity, 534.

FALL. *See* COPPICE.

- Of timber, when matter for compensation, 116, 224.
- Of buildings contracted for, purchaser pays for consequent damage, 117, 561.

FALSE DEFENCE.

- Its effect on costs, 543.

FAMILY.

- Declarations by members of, evidence of pedigree, 177.

FAMILY ARRANGEMENT.

- Money payable as part of, not liable to duty, 328.
- General validity of, 356, n. (x).

FARM.

- Includes what, 56.

FATHER.

- Purchase by, in name of child, an advancement, 437, *et seq*.
- Arrangements between, and son, their validity, 355, n., 357, n.

FEE SIMPLE.

- Vendor's interest if unexpressed, presumed to be, 51.

FEES. *See* STEWARD.

FELONS.

- How far incapable to sell or buy, 6, 13.

FEMALE.

- Elderly, presumption against her having issue, 175.

FEME COVERT. *See* MARRIED WOMAN.

FENCES.

Out of order, compensation when to be made for, 306.

FEOFFMENT.

Customary by infant, still valid, 3, n.

By lunatic, now inoperative, *semble*, 4.

Usual conveyance in Australia, 257, n.

FIAT IN BANKRUPTCY.

Not notice, 410.

Must issue within twelve months after act of bankruptcy, 396.

Annulled, purchase under, 397.

FIDUCIARY CHARACTER.

Persons filling cannot generally purchase the estate, 15.

General rule applies in what cases, 15 to 19.

Incompetent purchaser bound at option of parties interested, 19.

General rule, when inapplicable, or but partially applicable, 19, 20.

How far it affects trustees, 21, 22.

Risk incurred by disqualified purchaser, 22.

On what terms reconveyance decreed, 23.

Or estate ordered to be resold, 23, 24.

Purchaser having made a profit must refund it, 24.

General rule respecting costs, *ib.*

Time allowed for impeaching sale, 25.

Confirmation of voidable purchase, 26.

As to sales by persons filling, 27.

When ought they to sell, 27 to 31.

How ought they to sell, 31 to 35.

As to the price, 35 to 37.

General points respecting sales by, 37, 38.

Cannot allow compensation for their own errors, 65.

Whether they may sell under special conditions, 76 to 78.

Acting prudently not liable for loss through auctioneer, 82.

Enter into what covenants, 261, 263.

Should themselves receive the purchase-money, 310.

On sale by, apparently regular, purchaser need not investigate collateral questions, 410.

Contract by, not enforced, if amounting to a breach of trust, 490.

FINE.

On renewal, stated by vendor to be "small," 44.

Joint purchaser, paying, has a lien for, 434.

Manorial, alleged misdescription of, 48.

FINE—*continued*.

Need not be noticed, on sale of copyhold, 53.

On his own admittance, purchaser pays, 335.

Manorial, right to, as "rents and profits," how determined, 566.

FINE AND RECOVERY.

By lunatic were binding, when, 4.

How proved, 154.

Proof of, under statute, 155.

Defects in, when remedied by statute, 399.

FINES AND RECOVERIES ABOLITION ACT.

Lunatic cannot convey under, 4.

Conveyance under, by married woman, 270, *et seq.*

By tenant in tail of freeholds or copyholds 321, *et seq.*

FIRE.

Purchaser after contract bears damage by, 117.

Vendor need not insure against, *ib.*

Before confirmation of Master's report of purchase, 554.

FIRM.

Partner in, how affected by fraud of co-partner, 190, n.

FISH.

Tithes of, excepted from Commutation Act, 181.

Right of riparian proprietor to, 184, n.

Right to, when a profit *à prendre*, within Prescription Act, 185, n.

FIXTURES.

Conditions as to payment for, 61.

Tenant may sell to landlord by parol, 95.

Price of, liable to *ad valorem* duty, 254, 327.

As to interest on valuation of, during delay in completion, 296.

FLUCTUATING.

Value of property, may make time essential, 209.

disinclines Court to open biddings, 556.

Body, fact of vendors being, may make time essential, 209.

FOOTPATH.

Existence of, a patent defect, 39, 52, 509.

FORCIBLE.

Entry, an acceptance of title, 219.

FORECLOSURE.

Suit for, whether within 3 & 4 Will. IV. c. 27, 198.

Mortgagee selling after, cannot enforce collateral securities, 430.

FOREIGN LANGUAGE.

Agreement written in, Courts receive evidence of interpretation, 451.

FORFEITURE. *See* DEPOSIT.

By treason, felony, &c., 6.

Of lease, act by tenant amounting to, a part performance, *semble*, 478.

Agreement which would lead to, not enforced, 491.

FORGED INSTRUMENT.

Purchaser under, yet protected by getting in legal estate, 390.

FORMALITIES.

Of deeds may be presumed, 161.

Want of, in execution of powers. when supplied in Equity, 394.

Want of, when supplied, in contract by married woman, 463.

FRAUD.

By infant or married woman, relieved against, 3, 6, 11, 13.

Must be shown, in action against stranger for misstatement, 45.

Concealed, when Statute of Limitations begins to run, in cases of, 190.

Of one member of firm affects co-partner, *ib.*, n.

By vendor, incumbrancer encouraging, &c. postponed in Equity, 228.

In barring estate tail, remaindermen when relieved, 358.

Of vendor, purchaser accepting defective title by, relieved, 379.

Of agent, principal bound by, 380.

Purchaser not protected by legal estate obtained by, *semble*, 392.

Gross negligence may be treated as equivalent to, 405.

Mere suspicion of, does not affect purchaser, 411.

Nor render title doubtful, 525.

Of his own professional adviser, whether purchaser has implied notice of, 413.

How purchaser guilty of, must account, if sale set aside, 426.

A defence at Law, and in Equity, 454, 484, 492, 510.

When a ground for decreeing specific performance of parol contract, 477.

Or of a written contract with parol variations, 483.

Bill founded on unsubstantiated allegation of, is dismissed with costs, 472.

Groundless imputation of, its effect on costs, 541, 543.

A ground for setting aside sale by Court, after confirmation, 560.

In proceedings, purchaser under Court not affected by, 571.

FRAUDS, STATUTE OF.

Written agreement, when necessary under, 91 to 96.

What informal documents may constitute agreement within, 97 to 105.

What is a sufficient signature within, 105 to 108.

Does not affect right to waive by word of mouth contract not under seal, *semble*, 455.

Want of contract sufficient within, when supplied in Equity, 476, *et seq.*

Sales by auction and in bankruptcy, are within, 482.

But not sales by the Court, 555.

FRAUDULENT CONVEYANCES.

What are, 420 to 425.

As against creditors, 426.

FREE BENCH.

Wife's right to, bound by husband's contract, when, 462.

FREE PUBLIC HOUSE.

What is not, 56.

FREEHOLD.

Land presumed to be, if tenure not stated, 51.

If land sold as, prove not to be, defect is fatal, 63, 504.

FRIVOLOUS.

Objections to title, danger of taking, 215.

Defence, must be disposed of, before reference, 520.

FUNDS.

Purchaser, whether affected by variation in, 24, 88.
on purchase from Court, 566.

Loss by variation in, not recoverable at Law, 446.

FURTHER ASSURANCE.

Covenant for, a usual covenant, 259.

What can or cannot be required thereunder, 370.

What time, &c., allowed for executing, 371.

Purchaser's right in Equity to, 383, *et seq.*

Enrolled under 3 & 4 Will. IV. c. 74, confirms prior voidable estate created by tenant in tail, 385.

FURTHER DIRECTIONS.

Order for reference of title, should reserve, 522.

Cause to be set down on, if exceptions taken to report in favour of title, 528.

FUTURE.

Right to property, whether abstract showing, shows a good title at Law, 132.

GAVELKIND.

Infant may convey under custom of, 2.

GAZETTE.

Evidence of bankruptcy, 397.

Sale by Court should be advertised in, 553.

GENERAL WORDS.

Not cut down at law by evidence of intention, 352.

GLEBE.

Rector cannot buy the, 18.

How affected by judgments, 231, 233, 235.

GOODS.

Mortgage of reversion for price of goods sold, to resell, sustained, 357.

Right of stoppage *in transitu*, &c., on sale of, 345, n.

GOVERNOR.

Of charity, cannot buy or take lease of charity lands, 17.

GRANDCHILD.

Purchase in name of, an advancement, 437.

GRANT.

From Crown, title under, how to be abstracted, 139.

how proved, 155.

when presumed, 159.

purchaser must inspect the original, 202.

title against, by adverse possession, 200.

Of easement, when presumed, 160.

By lord of manor, presumed, 2 Vern. 517.

Ancient, modern usage admissible to show what passed under, 167, n.

The word, does not imply a covenant. See 8 & 9 Vict. c. 106, s. 4.

GRANTOR.

Of annuity, must disclose what to intended grantee, 42.

GRASS. See CROPS.

GROUND-RENT.

What it is, 56.

Improved, instead of, purchaser need not take, 504.

GUARANTEE.

Of solvency must be in writing, 46.

GUARDIAN.

Sale by, to ward, when relieved against, 7.

Cannot purchase from ward, 17.

And see STATUTORY VENDORS.

HAND-WRITING.

Evidence of, 178.

HARDSHIP.

A defence in Equity, 491, *see* 513, n.

Bill dismissed on ground of, defendant does not pay costs, 545.

Whether a ground for discharging purchaser under a decree, 573.

HEIR. *See* REPRESENTATIVES.

Of infants, may set aside sale or purchase by, 2, 10.

Infant, may sell under custom of gavelkind, 2.

Of lunatic, may set aside sale or purchase by, 3, 12.

Of married woman, not bound by sale by, 5.

Need not be named in contract not under seal, 96.

Rights of, under contract, 121 to 128.

Devisee selling, when required in Equity to prove will against, 164.

On sale by, or by party claiming under, will stated to be invalid must be produced, 165.

Latent, Statute of Limitations confers certain title against claim by, when, 199.

Want of conveyance by, when supplied by Trustee Act, 277, *et seq.*, 537.

Infant, costs of procuring conveyance from, 335.

Purchaser from, must see to payment of legacies, but not of debts, 292.

Expectant, sale of reversion by, relieved against, 355, *et seq.*

Customary, may sue before admittance, 374.

When entitled to sue for breach of covenants for title, 374.

When, and how far, liable on ancestor's covenants, 376.

Sale of expectancy by, yet purchaser can require further assurance, 385.

Whether registered conveyance by, displaces unregistered conveyance by ancestor, 401.

Of settlor on marriage, bound by limitations to collaterals, 421.

Sale by, displaces fraudulent, but not merely voluntary conveyance, 424.

Of purchaser, has no remedy at law upon the contract, 448.

HEIR—*continued*.

May enforce contract in Equity, 461, 469.

Of vendor, is bound by contract in Equity, 462.

When to be made a party to suit, 468, 469.

HERBAGE.

Exclusive right to, whether a profit *à prendre* within Prescription Act, 185, n.

HERIOTS.

Liability to, undisclosed, fatal to contract, 52.

Except on sale of copyholds, or manorial freeholds, 53.

Are *rent* within the 3 & 4 Will. IV. c. 27, 188.

HOUSE.

Materials, or number of, misstated, defect is fatal, 64.

HUSBAND.

Power of, over wife's chattels real, 5, 273, 464.

May annul purchase by wife, 12.

Signature by married woman in name of deceased, sufficient, 106.

Covenants for title, on sale of wife's estate, 261.

Concurrence of, in conveyance of her estate, when dispensed with, 273.

Contract by, for sale of wife's estate, effect of, 463, 464.

Will not be required to procure her concurrence, *semble*, 498.

HUSBANDRY.

Improper, depreciation by, must be compensated for, 307.

by purchaser, a reason for purchase-money being paid in, 516.

IDENTITY.

Failure of, in subject-matter of contract, fatal, 64.

Condition respecting, 69.

Of parcels, and individuals, presumption of, 166, 167.

Of individuals, whether proveable by declarations, &c., as a matter of pedigree, 179.

Latent ambiguity respecting, may be removed by evidence of intention, 453.

IDIOT. *See* LUNATIC.

ILLEGAL.

Agreements cannot be enforced, 111 to 113.

At Law, or in Equity, 454, 490.

Omission of stipulation supposed to be, is binding, 488.

Allegation in answer that agreement is, 544.

ILLEGIBLE.

- Abstract so written as to be, need not be received, 146.
- Agreement, evidence to decipher, 451.

ILLEGITIMACY.

- Of child born in wedlock may be proved, 170.
- Does not rebut presumption of advancement, 437.

IMMATERIAL.

- Terms of agreement need not be proved, 481.

IMPRISONMENT. *See* DURESS, and 492, n. (x).

IMPROBABLE.

- Claim, possibility of, whether title bad, 526.

IMPROVEMENT. *See* ACCOUNTS, EXPENDITURE.

- Intended, of adjacent land, effect of plan showing, 55.
- In estate, after contract, belongs to purchaser, 116 to 118, 560.

IMPROVIDENT.

- Contract by agent, not enforced, 491.

INADEQUACY.

- Of consideration, when a ground for a reconveyance, 353, *et seq*
- On sales of reversions, 355.
- How determined, 357.
- When a defence in Equity, 510, *et seq*.
- Its effect on costs, 543.

INCAPACITY.

- To sell or purchase, 1 to 26.
- To convey, a breach of covenant for right to convey, 367.
- Of defendants to contract, a defence in Law, 454.
and in Equity, 489.
- Of plaintiff, whether a defence in equity, *ib*.

INCAPACITATED OWNERS. *See* STATUTORY OWNERS.

INCIDENTS.

- All legal, presumably accompany estate, 51.

INCLOSED LANDS.

- Conditions usually requisite on sale of, 74.
- Title to, 134 to 136.

INCLOSURE ACT.

- Commissioners and valuers under, cannot purchase land in parish, 17.
- Provisions of, as to evidence of compliance with, 135.
- Award under, how proved, 150.

INCOME TAX.

Not deducted from interest paid into court, 561.

INCOMPETENT.

Person, bidding by, at sale by court, 553.

INCONSISTENT.

Descriptions of parcels, not within common condition respecting identity, 69.

INCORPOREAL.

Hereditaments, covenants run with, 366.

INCREASE.

Of rent, agreement for, must be in writing, 95.

Of purchase-money, 293, *et seq.*

INCUMBRANCES.

On client's estate, counsel cannot buy at a profit, 17.

Effect of, on power of tenant for life to consent to sale, 35, n.

Vendor must disclose, if not apparent on the deeds, 41.

Inquiry respecting, should be made of supposed claimant, and of trustees of legal estate, 42, 43.

Permanent, should be noticed in particulars, 52.

Condition, as to indemnity against, 70.

Notice of, to purchaser, before conveyance executed, is binding, 115.

Whether imperfections of title, in Equity and at Law, 131 to 133.

Equitable, which are satisfied, whether instruments creating should be abstracted, 143 to 145.

Subsisting, should be abstracted, 145.

And *trusts* for payment, difference between, 190, n.

On land, right to recover when barred, 197 to 199.

As to searches for, and inquiries respecting, generally, Ch. XI.

Fiduciary vendors covenant against, 261.

As to the discharge of, on completion, 281, *et seq.*

Purchaser, when liable to see to, 291.

Vendor, whether bound to get in, by separate deed, 246, 339.

Purchaser, keeping on foot, must pay expenses, 340.

His right to pay off, after conveyance, out of unpaid purchase-money, 381, 390.

Legal estate, when a protection against, 389, *et seq.*

Concealed, thrown wholly on *puisne* equitable purchaser, 393.

In favour of charities, rule as to notice, 394, 425.

What is notice of, 402, *et seq.*

Contribution to, 428.

Merger of, 442, n.

INCUMBRANCES—*continued*.

Expenses of searches for, when recoverable, 446.

Affecting enjoyment of estate, a defence in Equity, 506.

Application of money in discharge of, on sale by Court, 561, 565.

INCUMBRANCER. *See* CLAIM, EXPENDITURE, INCUMBRANCE, MORTGAGEE, NOTICE, PRIORITY.

Releasing, covenant by, 262.

INDEMNITY.

Nature of, if offered, should be stated, 70.

Mutual, condition for, on sale of leasehold estate in lots, 76.

Lessee, entitled to, from equitable assignee of term, 129.

Vendor of leaseholds can require, when, 265.

Executor of lessee, entitled to, on sale by Court, 567.

Covenant for, does not run with land, *semble*, 361, n. (b).

Vendor's right to, its effect on purchaser's right to avoid leases, &c., 416.

Neither to be given nor taken compulsorily, unless by agreement, 503.

INDORSEMENT.

On deed, should be examined, 206.

Of notice of conveyance, on leading title deed retained by vendor, 324.

INDORSED RECEIPT.

Unusual position of, should be explained, 207, 409.

Not conclusive as to payment, in Equity, 310, 345; *see* 411.

Is counted as part of the deed, 332.

INFANT.

How far incapable to sell or purchase, 2, 3, 10 and 11. *And see Wright v. Snowe*, 2 De G. & S. 321.

Facilitating fraud by vendor, 228.

Cestuis que trust, trustees for, can give discharges, when, 284, 287.

Trustees and mortgagees, conveyance by. *See* CONVEYANCE.

Costs of obtaining, 335.

Incumbrancer, encouraging purchase or expenditure, 228, 394.

Estate of, person buying may be treated as bailiff, 427.

Made a co-plaintiff in respect of adverse or inconsistent right, no decree, 466.

Cannot enforce specific performance, but other party cannot rescind contract, 489.

Conveyance of estate of, Master must settle, 535, 567.

May be ordered to convey, 568.

Refusing, attachment may issue against, 569.

INFERENCE.

Instrument produced merely to negative, need not be abstracted, 142.

Of Law, whether bill need state, 471.

INFORMATION.

Whether purchaser precluded from evidence may require, 73

INHERITANCE.

Fiduciary vendors must sell timber, &c., along with, 33.

All that forms part of, belongs to purchaser from date of contract, 116.

Owner of any portion of, can sue on covenants for title, 366.

Owner of first estate of, when to be a party to suit, 469.

INITIALS.

Signature of, agreement by, sufficient, 106.

INJUNCTION.

Against sale by fiduciary vendors, rare, 38.

Granted against waste by purchaser in possession before completion, 118.

Or against process for rent by landlord vendor, 119.

Not against mortgagee contracting to sell estate and suing for mortgage debt, 128.

Against breach of covenant, 362.

Against action for deposit, when, 446, 456, 518.

Against action for deeds, by purchaser under decree, 570.

IN LOCO PARENTIS.

Purchase by one standing, an advancement, 438.

INQUIRY.

Should be made of supposed claimants on estate, 42.

Of trustees of real estate confers no priority, 43.

By purchaser, vendor not bound to answer what, 164.

Of vendor's solicitors, supposed incumbrancers, &c., 227, *et seq.*

Purchaser fraudulently abstaining from, case of, 405.

Purchaser negligently abstaining, &c., 409, 412.

INROLLED DEEDS.

Secondary evidence whether admissible in proof of, 65.

INSANITY. *See* LUNATIO.

Evidence of, 12, n.

INSCRIPTIONS.

When evidence of pedigree, 178.

INSOLVENCY.

Of auctioneer, loss by, falls on vendor, 82.

INSOLVENCY—*continued*.

- Of party to contract, does not avoid it, 120.
- Proceedings in, how proved, 156.
- Of debtor by judgment, 236.
- Court of, when to be searched, 242.
- Of purchaser, a ground for appointing a receiver, 518.

INSOLVENT.

- How far incapable to sell or buy, 6, 13.
- Assignees of, when they must sell, 28.
 - how they should sell, 32.
 - may sell below price fixed by creditors, 35.
 - appointment of, to be registered, when, 398.
 - costs of, on disclaimer, 546.
- Purchaser, assignees of, disclaiming, estate decreed to vendor, 465.

INSTALMENTS.

- Ad valorem* duty on purchase-money payable by, 327.

INSTRUCTIONS.

- Private, to agent, effect of, 84.
- Agent exceeding, principal not bound, *ib*.
- Writing sent as, may amount to agreement, 105.

INSURANCE.

- Against fire, vendor need not keep up, 117.

INTENTION.

- Of author of trust, test of trustees' power to give receipts, 283, *et seq*.
- Of vendor, as to lien for purchase-money, may be shown, 350.
- Evidence of, cannot at Law cut down general words, 353.
- Of parties to covenants, is to be collected from entire deed, 373.
- Evidence of, when admissible at Law, in aid of agreement, 453.

INTEREST. *See* ACCOUNTS.

- On purchase-money, condition respecting, 58 to 60.
- As to payment of, 293 to 302, 383, n.
- Miscalculated, vendor cannot claim after conveyance, 351.
- On deposit, auctioneer not liable for, 82.
- Purchaser evicted can recover, when, 375, 377.
- Purchaser can recover, at Law, on breach of contract, 446.
- Not allowed on money refunded on appeal, 538, 548.
- On money charged on land, for what time recoverable, 198.
- First purchaser allowed, if biddings opened, 558.
- When allowed to person opening biddings and outbid, 559.
- Paid into Court must be clear of income tax, 561.

INTEREST—*continued*.

Of vendor in property, purchaser must disclose facts increasing, 46.

Of vendor and purchaser, and their representatives, under contract, 114; Ch. VII.

Reversionary, of married woman, acknowledged deed passes what, 273.

In estate, conveying party mistaking, has no remedy, 352.

Subsequently acquired, purchaser may call for, 383.

When bound by contract for sale, 499.

Partial, when vendor bound to convey, 501.

Contracted for, title not shown to, a defence, 504.

INTERPLEADER.

Order for, auctioneer may obtain, in respect of deposit, 81.

INTERPRETATION.

Of agreement, evidence of, admissible at Law, 451.

INTERRUPTION.

Under Prescription Act, means adverse obstruction, 187.

INTESTACY.

And death of vendor before conveyance, rights of heir, 121, 122.

And death of purchaser before conveyance, rights of heir, 126.

What evidence of, can be required, if title commences with conveyance by heir-at-law, 163.

Or in other cases, 165.

How proved, 168.

If doubtful, Statute of Limitations not to be relied on, 199.

INTOXICATION.

Of party to contract, its effect, 489.

INVESTIGATION.

Of title, should be expressly precluded, if so intended, 68.

Purchaser neglecting, has constructive notice of defects, 406, 408.

Costs of, when recoverable at law, 446.

INVESTMENT. *See* APPROPRIATION, PURCHASE-MONEY.

Of purchase-money, fiduciary purchaser, whether bound by, if sale set aside, 24.

Of deposit, condition for, when expedient, 57.

Of deposit, when binding on purchaser, 88.

Of purchase-money, and declaration of trust, discharge purchaser, 285.

Of purchase-money paid by Railway Companies, &c. 311, *et seq.*

INVESTMENT—*continued*.

Costs of, 337.

By father, of his own money along with settled funds, an advancement, 440.

Loss by, not recoverable at Law, 446.

Of purchase-money on sale by Court, purchaser when bound by, 566.

IRREGULARITY.

In proceedings, purchaser from Court, whether affected by, 570.

ISSUE.

Failure of, when presumed, 174.

Presumption against aged female having, 175.

ISSUE IN TAIL.

Barred, under 3 & 4 Will. IV. c. 27, to same extent as tenant in tail, 194, 195.

Not bound by agreement by tenant in tail, 463.

JOINT-PURCHASERS.

What duty on conveyance to, 329.

Rights, &c. of, under conveyance, 432, *et seq.*

Of estate from Court, purchase-money must be paid entire, 561.

JOINT-TENANT.

Possession by one does not save the right of another, 192.

Estate of, how affected by judgments, 231, 234.

At Law, when not so in Equity, 432, *et seq.*

Lien of, on estate, for expenditure, &c., 434.

JOINTURE.

Relied on in bar of dower, title to land must be shown, 252.

Release of, a sufficient consideration for settlement, 420.

JOURNEYS.

Expenses of, condition as to, 70.

To examine deeds, 201.

To estate, allowed on opening biddings, 558.

JUDGMENTS.

Bind purchaser's interest under contract, 115.

Against vendor, give a lien on unpaid purchase-money, 119.

Should be abstracted, 145.

Entering-up judgment, what is, 234, n.

Vendor cannot be required to search for, 163.

As to searching for, general law respecting, 230 to 241.

Judgment creditors, when to concur in conveyance, 250.

Against purchaser, vendor's lien is a protection against, 351.

JUDGMENTS—*continued*.

Where part of purchase-money remains on mortgage, 351.

Are subject to prior equities, 398.

Unregistered, notice of, must be actual, 402.

Registered, are notice only if purchaser search register, 406, 410.

Order in suit for payment by purchaser, a judgment debt, 535.

JURISDICTION.

Trustees, &c. out of, conveyance from. *See* CONVEYANCE.

LANDS CLAUSES CONSOLIDATION ACT, 1850.

Enables incapacitated owners to convey, 6.

Subject to what restriction as to time for compulsory purchases, 28.

As to sales under, by trustees, and other fiduciary vendors, 36.

Or by municipal corporations, 37.

Notice under, when and how far an agreement for purchase, 98, 99.

Company, on sales under, pays for abstract, 131.

Conveyance under, by promoters of undertaking to themselves, 275.

Discharge of incumbrances under, 283.

Payment and investment of purchase-moneys under, 311, 313.

Assurance of copyholds taken under, to be entered on Court rolls, 324.

Payment of costs under, 336, *et seq.*

Vendor's rights of pre-emption of superfluous lands, 359.

Omitted interests, provides for their subsequent purchase, 429.

LAND. *See* COVENANT.

Agreement to sell, includes vendor's entire interest, 51.

Includes what, under 3 & 4 Will. IV. c. 27, 188.

Loss of, not certainly compensated for in damages, 459.

LANDLORD.

Agreement by, with tenant, what must be in writing, 95.

Agreement by, for sale of land to tenant, its effect, 119.

LANDOWNER.

Notice by, to company, when an agreement, 99.

Rights of, as to deposit made by company before entry, 225.

Selling to company, enters into what covenants, 260.

In possession, right of, to money paid into Court, 312.

LAND-TAX.

Is presumptively a charge on property, 180.

Redemption of, how shown, *ib.*

In cases of allotments, *see* *Boehm v. Wood*, Turn. & R. 334.

Certain defects in title to, removed by statute, 399.

LATENT.

Defects, what are, 40.

must be disclosed by vendor, *ib.*

Ambiguity in agreement, evidence to remove, 453.

LAW.

Proceedings at, how proved, 155.

And Equity, plaintiff must elect between, when, 351, 456.

Remedies at, for breach of contract, Ch. XVII.

Results of, whether to be stated in bill, 471.

Inability to recover damages at, whether a defence in Equity, 496.

Case not sent to, without purchaser's consent, 523.

costs of, 547.

Questions of, Court more readily decides against purchaser than questions of construction, 524.

LEASE.

Premium obtained fraudulently by infant for, returned, 3.

To aliens, past and present Law respecting, 9.

Infant repudiating, and having enjoyed part of term, cannot recover premium for, 11.

Putting up of, to sale by Assignees, 37, n., 129.

Notice of, whether notice of all its contents, 41.

Covenants, &c., in, need not be mentioned on sale of, 53.

But there must be no misrepresentation, &c., 53, 54.

Removal of buildings, when to be stated on sale of, 54.

Misdescriptions respecting, when fatal, 64, 67.

Conditions usually requisite, on sale of, 75, 76.

What agreements respecting, must be in writing, 91 to 93.

How affected by contract for purchase of reversion, 119, 128.

Or by contract by lessor to purchase underlease, 129.

Equitable assignee of, in possession, bound to indemnify original lessee against breaches of covenant, 129.

Title to be shown, on sale of, 137, 138.

Ecclesiastical, recitals in, when evidence, 154.

In writing, its effect on rights of reversioner, under 3 & 4 Will. IV. c. 27, 193.

Preparation of, when a waiver of lessor's title, 218.

Grant of, in, equivalent to possession, 220.

How far liable to judgments, 231, 232, 234, 235, 237.

Counterpart of, when to be deposited, 315.

What to be entered in county register, 318.

Unregistered, defect not supplied by registering assignment, 401.

When liable to *ad valorem* duty, 328.

LEASE—*continued*.

- Agreement for in conveyance, no additional duty, 332.
- Lessee pays costs of, and lessor's solicitor prepares, 336.
- Property in, rights, &c., of purchaser after conveyance, 386, 387, 566.
- Next estate is now the reversion, 387.
- Purchaser of, has what notice of lessee's title, 410.
- Void or voidable, purchaser may dispute, when, 416 to 419.
- Whether vendor may set aside, for his own benefit, 417.
- Agreement to assign, how not to be performed, 504, 506.

LEASE FOR A YEAR.

- Recital of, when evidence, 154.
- Reference to Act dispensing with, unnecessary, 257.

LEASEHOLD. *See* LEASE.

- Described as the freehold, variance is fatal, 63, 504.
- Covenants by vendor of, 259.
- by purchaser of, 265, 567.
- Occupation rent to be paid for, instead of interest, during delay in completion, 297.
- Covenants for title run with, 365.
- Instead of freehold, purchaser need not take, 504.
- And see* LEASE, LESSEE, and LESSOR.

LEGACY.

- Right to recover, when barred under 3 & 4 Will. IV. c. 27, 197.
- Evidence of payment of, 197, n.
- Charged on land, registered judgment charges, *semble*, 238.
- Payment of, when purchaser need see to, 284, *et seq.*, 291, 292.
- Assignment of, need not be registered, 318.

LEGAL ESTATE.

- Dependent on precedent conditions, difficulty attending sale, 31.
- Trustee of, must convey to trustee for sale of equitable estate, 38.
- How far a protection to purchaser, 115, 232, 345, 383, 389 to 392, 400.
- Conveyance of, when in infants, &c. *See* CONVEYANCE.
- Being outstanding, when not a defect in title, 131, 562.
- notice of, is notice of its trusts, 408.
- But abstract must show in whom it is vested, 132.
- All documents affecting, should be abstracted, 143.
- Reconveyance of, when presumed, 159.
- Trustees of, vendor must procure, to convey, 498.

LEGATEE.

Of bond debt, can set aside purchase by lunatic testator, in consideration of release of debt, 12.

Court may sell under 3 & 4 Will. IV. c. 104, in suit by, 550.

LEGITIMACY.

Of child born in wedlock, when presumed, 169, 170.

LESSEE.

Misdescription of occupier as, not matter for compensation, 65.

Purchase of reversion by, 119, 128, 387.

Has constructive notice of lessor's title, 409.

LESSOR.

Title of, condition against producing, 67.

Contract for sale of crops by, to incoming tenant, must be in writing, 95.

Effect of contract by, to purchase under lease, 129.

Title of, when to be produced on sale, 137.

lessee has notice of, 409.

notice of tenancy, not notice of, 410.

LETTER.

May constitute agreement, 97, 98.

When insufficient for that purpose, 99.

Binds writer from time of transmission, 101.

Party accepting offer by, not responsible for delay in post office, *ib.*

Imperfect references in, to other documents, 102.

Agreement. or merely treaty by, distinguished, 104.

Stamps on agreement by, 109.

To counsel, &c., as to producing, 415.

How to be referred to, in bill, 471.

LIABILITY.

General, of fiduciary vendors, 37.

Of auctioneers, 80 to 83.

Of agents, 83 to 87.

Under lease, condition for apportionment of, on sale, 76.

Of purchaser under contract, his alienee, &c., must undertake, 115.

To perform contract, not affected by death, &c. &c., 120.

tests the relative rights of either party's representatives, 122 to 127.

Fresh, incurred by vendor, makes time essential, 209.

Of vendor, purchaser must undertake what, 265.

Mutual, under contract, whether dependent, 449.

Of purchaser, matters increasing, when a defence in Equity, 506.

LICENSE.

- Parol, to use land, whether valid, 92.
- Is determined by the conveyance, 430.
- Void agreement may operate as, to excuse trespass, 93.

LIEN.

- Implied, fiduciary purchaser, ordered to reconvey, has none for balance due, 23.
- Vendor has, on estate and conveyance, for purchase-money, 118, 267.
 - suits by, to enforce, is for recovery of money charged on land, 198.
- Judgment is a, on unpaid purchase-money, 119.
- Landowner has none, for costs, on sum deposited by Railway Company, 225.
- Of mortgagee's solicitor, on deeds, its extent, 204.
- Vendor's solicitor has none, on conveyance, for costs, 267.
- Vendor's, for unpaid purchase-money after conveyance, its extent and nature, 345, *et seq.*
- When lost, by taking security, &c., 346 to 349.
- May subsist as to part only of unpaid money, 350.
- Presumable intention for or against lien may be rebutted, *ib.*
- How lost as against third parties, *ib.*
- None implied in favour of disqualified persons, *ib.*
- Is merely equitable, 351.
- Is a protection against judgment creditors, when, *ib.*
- Does not extend to miscalculated interest, *ib.*
- Purchaser has none on appropriated purchase-money, 382.
- Notice of possession of deeds is notice of, 408.
- Vendor's tenancy, when not notice of, 411.

LIFE.

- Misdescription of, how not qualified, 44.
- Dropping of, before conveyance, 116 to 118, 555.
- Must be shown to exist, on sale of renewable lease, 138.
- Estate or annuity, on sale of, time is material, 209.
 - purchaser of, from Court, when entitled to, 567.

LIGHT.

- Adjoining land stated to be building land, yet vendor may not build on so as to obstruct even new lights, 55, 56.
- Title to rights of, under Prescription Act, 184 to 188.

LIMIT.

- Of price, agent exceeding, principal not bound, 84.

LIMITATIONS, STATUTE OF.

- Delay for less than time allowed by, may bar right to relief in Equity, 25.

LIMITATIONS, STATUTE OF—*continued*.

Tithes, how affected by, 183.

General provisions of, 188 to 200.

Purchaser compelled to accept title under, 199.

Suit to enforce vendor's lien is not within 25th sect. of, 346.

Begins to run, when, in favour of covenantor, 366.

on conveyance by trustees in breach of trust,
427.

LIS MOTA.

Declarations used as evidence must be made before, 179.

What is a, *ib*.

LIS PENDENS.

Search for, is usually directed, 230.

for what period, 242.

Must be registered, to bind purchasers without notice, 399.

Is notice, only if registered, 406, 410.

LIVERY OF SEISIN.

Presumption of, 161.

LOCAL.

Public act, liabilities under, need not be stated, 53.

as it is notice, 406.

Derivation of family, whether a matter of pedigree, 179.

Measures abolished, 303.

Customs, evidence of, to explain contract, 452.

LONDON.

Middlesex Register Act does not affect, 318.

LORD OF MANOR.

Customary validity of grant by, must be shown, 75. 

And title of, on sale of enfranchised copyhold, 137.

LOSS.

Fiduciary vendors selling by auction, not generally liable for, 36.

Aliter, if they buy in, and re-sell without authority, 37.

Through auctioneer, falls on vendor, 82, 89.

By investment. See INVESTMENT, and FUNDS.

Of unstamped agreement, 110, 453.

Accidental, after contract, falls on purchaser, 116.

rule, on sales by the Court, 554, 560.

Of early title, how to be provided for by conditions, 68.

Of deed, when not an objection to title, 145.

lets in secondary evidence of its contents, 65, 152.

what sufficient evidence of, *ib*.

By breach of contract, what recoverable at Law, 446, 447.

LOTS.

- Fiduciary vendors may sell in, 32.
- Alteration in, should be advertised, 33.
- On sale in, abstract should be verified at vendor's expense, 70, 77.
- Of leaseholds in, what conditions requisite, 76.
- Employment of several bidders, whether allowable, 89.
- Who entitled to deeds, 314, 569.
- Stamps, on agreement for purchase of several, 109, 110.
- Purchaser of one, when made a party to suit respecting another, 466, 467.
- Part performance as to one does not affect another, 482.
- Defect in title to one of several, 507.
- As to opening biddings on some only of several, 557.
- If biddings opened, estate may be re-allotted by order, 558.

LUNACY.

- Evidence of, 12, n.
- Subsequent, does not avoid contract, 120.

LUNATIC.

- How far incompetent to buy or sell, 3, 4, 12, and see *Price v. Berrington*, 7 Ha. 394.
- Vendor, conveyance from, under, 1 Will. IV. c. 65, 537.
- Highest bidding by, on sale by Court, 553.
- See COMMITTEE and CONVEYANCE.

LYING IDLE. See PURCHASE-MONEY.

MAINTENANCE.

- Agreement amounting to, invalid, 112.

MAJORITY.

- Of creditors, or *cestuis que trust*, cannot bind minority, when, 21, 26.
- Of creditors of insolvent, direct time and mode of sale, 32.

MANAGEMENT.

- Acts of, by purchaser in possession, no waiver of title, 220.

MANDAMUS.

- To compel inspection of Court Rolls, 242, n.
- Existence of remedy by, whether a defence in Equity, 460.

MANOR.

- Customary restrictions upon alienation, removed, 7, n.
- Customs of, need not be stated on sale of copyholds, 53.
- Freeholds, stated to be held of, quit rents and heriots need not be referred to, *semble, ib.*

MANOR—*continued*.

Condition as to title to, on sale of enfranchised copyholds, 47, 137.

Condition as to customary grants of waste, 75.

On sale of, fines when considered to accrue, 566.

See COURT-ROLLS.

MANSION.

Vendor not compelled to convey, apart from estate, 500.

MANUFACTORY.

Effect of notice by Railway Company to take part of, 99.

Vendor contracting to sell entirety not forced to convey only shares in, 500.

MARRIAGE.

To British subject, naturalizes female alien, 10.

Presumption of, 171.

Evidence of, 176 to 180.

Settlement, as to covenants by vendor claiming under, 259.

A sufficient consideration for settlement, 421.

Whether so as in favour of collaterals, *ib. et seq.*

Subsequent, may support prior voluntary settlement, 424.

Is not a part performance of parol agreement, 479.

MARRIED WOMAN.

How far incapable to sell or buy, 5, 6, 12.

Signature by, in name of first husband, valid, 106.

When barred under 3 & 4 Will. IV. c. 27, 194.

Husband covenants, on sale of her estate, 261.

Cannot convey by attorney, 269.

Conveyance and disclaimer by, under statutes, 269 to 275.

Assignment by woman, erroneously supposing herself to be, 352, n.

Fraudulently encouraging purchase, &c., is bound, 394.

Contract for sale of her estate, when enforced, 463.

Surviving, whether she may adopt husband's contract, 464.

Separate estate of, bound by her contract to purchase, 465.

And husband, voidable contract by, for sale of her estate, whether purchaser can rescind, 489.

When not ordered to convey, 568.

MASTER.

Purchase before a, by trustee, &c., invalid, 15.

Sales before, are not within Statute of Frauds, 91, 555.

Reference of title to, and proceedings on, 519, *et seq.*

Settlement of conveyance by, 535, *et seq.*

MASTER—*continued*.

Appointed under 1 Will. IV. c. 36, to convey, 538.

Bill recommended by, yet dismissed with costs, 540.

And see, as to sales before, Chap. XIX.

MATERIAL.

Facts, not appearing on deeds, vendor must disclose, 41.

Misstatements avoid contract, 63, 64.

MEANS.

In covenants for title, 368.

MEASURES.

Statutory and local, 303.

Statutory meaning of expressions referring to, not varied by parol, 452.

MEMORANDUM.

To be indorsed on leading title deed retained by vendor, 325.

MEMORIAL.

Copy of, when evidence of registered deed, 153.

Contents and attestation of, 319, 320.

Stamps on, 319, n.

MERGER.

Of charges, on purchase by incumbrancer, 442, n.

MINES.

And minerals, should generally be sold by fiduciary vendors with surface, 33.

Are not *primâ facie*, included in sale or conveyance to Railway or Waterworks Company, 52, 258.

Liability to right to dig for, its effect on title, 52, 503, 506, 527.

Customary right to dig for, in mining districts, 53.

Shares in mining company, parol agreement for sale of shares in, void, 93.

what title must be shown to, 138.

Mining adits, 184, n.

MINERALS.

Parol agreement to sell, as a chattel, valid, *semble*, 94.

Belong to purchaser from date of contract, 116, 306.

Tithes of, not within Commutation Act, 181.

Right to dig for, may, but exclusive right to particular stratum of, cannot, be claimed by prescription, 185, n.

Conveyance of, should reserve power of entry, when, 266.

MISAPPREHENSION.

By one of several vendors of the extent of his interest, immaterial after conveyance, 352.

Agreement entered into under, when not enforced, 485.

MISCALCULATED.

Interest, vendor cannot claim after conveyance, 351.

MISDESCRIPTIONS.

Destroy effect of what would otherwise be notice, 54.

Condition respecting, 62 to 65.

Fiduciary vendors cannot allow compensation for, 65, 78.

What are so material as to avoid contract, 63, 64.

Purchaser from Court allowed compensation for, after conveyance, 571.

And see MISREPRESENTATIONS.

MISINFORMATION.

As to incumbrances, &c., how far trustees giving, are responsible for, 43, 229.

By purchaser, vendor relying on, and selling at under-value, relieved after conveyance, 353.

MISREPRESENTATION.

Purchaser from infant relieved only on ground of, 3; *and see Wright v. Snowe*, 2 De G. & S. 321.

Unintentional, by vendor's agent, 40.

by principal, 394.

Of value &c., by vendor, 43 to 45.

Of estate by purchaser to third person, 46.

Of terms of lease, avoids contract, though lease read at sale, 53.

Inadequacy of price, occasioned by, sale set aside, 353.

Purchaser accepting defective title through, relieved, 378, *et seq.*

A defence in Equity, 485, *et seq.*; 492, 496, 503, 510.

Its effect on costs, 541.

MISTAKE.

Purchase by, specific performance of not enforced, 90.

By vendor, as to extent or value of the property, or of his interest therein, no relief after conveyance, 351, 352.

Aliter, if a conveyance of farm A., by mistake, include B., *ib.*

Lands omitted by, purchaser can claim, 383.

When not an excuse for misrepresentation, 43, 229, 395.

Whether a ground for varying written agreement in favour of plaintiff, 483.

When a defence in Equity, 484, 485, 492.

Not a ground for opening biddings after confirmation, 560.

MIXED FUND.

Proceeds of sale of real estate, to be applied as, with personal estate, executors can give receipts for, 285.

MODIFICATION.

Of waiver by constant demand of title, 221.

MODUS.

Tithe Commutation Commissioners may decide on validity of, 181.

How otherwise established, 182.

When within the 3 & 4 Will. IV. c. 27, 188.

MONEY.

Charged on land, how long recoverable, 197, 198.

To be invested in land, married woman's reversionary interest in, can be assigned, 273.

MONTH.

Means, *primá facie*, lunar month, 215.

MONUMENT.

Is evidence in questions of pedigree, 178.

"MORE OR LESS."

Quantity of land stated to be, 308.

MORTGAGE.

On sale of estate in, arrangement as to the deeds, 66.

For term, whether a sufficient root of title, 141.

And reconveyance, should not be taken off the title, 143.

Equitable, by deposit, need not, if satisfied, be abstracted, 144.

is not affected by subsequent judgments, 237, 398.

is subject to prior equities, 393.

Payment of, and reconveyance, when presumed, 160.

Interest on, for what time recoverable, 198.

Debt, whether judgment is now a charge on, 237.

Power to lend on, implies power to give receipts, 291.

As an investment, report by Master against, sustained, 313.

And conveyance, double duty on deed operating as, 331.

Taken for purchase-money, destroys vendor's lien, 346.

Of estate to vendor, for securing part of purchase money, judgments against purchaser are immaterial, 351.

For price of goods, bought to raise money, supported, 357.

Title, notice of, is notice of equity of redemption, 408.

And conditional purchase, distinguished, 388.

Apparent conveyance may be shown to be, 437.

Mortgagor not compelled to pay off, in order to grant lease, 491.

MORTGAGE—*continued.*

Settlement reserving power to, when valid, 425.

Purchaser of estate in, may dispute voidable leases, when, 419.

And see INCUMBRANCES.

MORTGAGEE.

Or his agent, cannot buy under power of sale, 17.

May buy from mortgagor, 18.

Permission for, to bid in bankruptcy, whether requisite, *ib.*

May sell, under power, without mortgagor's concurrence, 28.

Should not conduct sale in bankruptcy, 32.

As to mode of sale by, &c. *See* FIDUCIARY CHARACTER.

Oppressive sale by, not necessarily invalid, 33.

Contracting to sell, may yet sue mortgagor, 128.

May recover land, within what period, 189.

Acquires absolute title, under 3 & 4 Will. IV. c. 27, when, 196.

Right of, to retain deeds, until paid, 204, 205, 570.

Losing, or destroying deeds, liability of, 205.

Conveyance of mortgaged estate by. *See* CONVEYANCE.

Settling several mortgages by same deed, liability of, 315.

Inquiry of, and notice to, by purchaser of equity of redemption, 325.

Omitting to take, or giving up deeds, how affected, 345, 395, 409.

Buying equity of redemption, 430.

Selling after foreclosure, cannot sue on collateral securities, 430.

Not proper party to mortgagor's suit, 466.

Proving debt in suit, bound at once to convey on sale, 568.

Consenting to sale, must leave deeds with Master, 570.

See INCUMBRANCER.

MORTGAGOR.

Agreement for his concurrence in sale by mortgagee, 28.

Not tenant at will to mortgagee within 3 & 4 Will. IV. c. 27, 191.

Right of, to redeem, when barred, 196.

Not proper party to mortgagee's suit, 465.

MORTMAIN.

Corporations cannot purchase without license to hold in, 8.

Act, enrolment under, 320.

MOTIVE.

For purchase, unexpressed, time not essential, 210.

MURDER.

Attainder for, involves forfeiture and escheat, 6.

MUTILATION.

Deeds how affected by, as evidence, 161.

MUTUALITY.

On ground of, vendor's bill for purchase-money sustained, 460.

Want of, when a defence in Equity, 493 to 496.

NAME.

Of unincorporated class, purchase in, bad, 8.

Of principal, auctioneer not disclosing is personally liable, 80.

Of stranger, contract entered into in, whether valid, 85, 496.

Of principal, agent should sign in, 85. *And see SIGNATURE.*

being undisclosed, agent may vary times of payment, 86.

Of each party to contract must appear, *semble*, 100.

Of covenantee, when purchaser may sue in, 366.

NATURAL-BORN.

Subjects, who are, 9.

NATURALIZATION.

How procurable, 9.

NE EXEAT.

Writ of, when granted against purchaser. *See Turn. & R. 342, et seq.*

NEGATIVE.

Evidence, vendor does not give copies of, or covenant to produce, 158, 166, 315.

will or codicil, may be required as, when, 165.

NEGLECT.

Gross, by either party in proceeding with contract, entitles other party to rescind, 210.

To require performance of contract, when a waiver of time, 213.

Meaning of, in covenants for title, 369.

NEGLIGENCE.

Gross, in preparation of particulars, its effect, 62.

Of auctioneer, &c., defeats his claim to remuneration, 82.

Gross, may be treated as notice, 405, 409.

Biddings whether opened for, after confirmation, 560.

NEGOTIATIONS.

Preliminary to contract, rules to be observed in, 39 to 47.

Condition for rescinding contract, how affected by, 72.

Upon title, 215 to 220.

NEW TITLE.

Vendor, when bound to convey, 383, *et seq.*

Acquired by plaintiffs in Equity, after bill filed, 495.

NOMINAL. *See* RESULTING TRUST.

Agent, contract by, when enforced, 85, 496.

NON-EXISTENCE.

Of estate, whether any relief for, after conveyance, 382.

Of part of estate, and want of title to, distinguished as defences, 497.

NOTICE.

Of equitable incapacity in original, affects sub-purchaser, 22.

Of alteration in sale, fiduciary vendors should give, 33.

Matters of which purchaser has, vendor need not state, 41, 53.

Misrepresentation avoids effect of what would be, 54.

Lease is, of what, 41.

Should be given to mortgagee, on purchase of equity of redemption, 325.

on purchase of equitable estate, 43.

But does not give priority, as between equitable estates in land, *ib.* 229, 393.

Of claim to estate by stranger, no cause of action, 47.

By or to Railway Company, may constitute agreement, 98, 122.

Single, does not exhaust statutory power to purchase, 99.

Adverse, not acted on, its effect on title, 164, 526.

Of deposit, absence of deeds may amount to, 205.

Time, not originally essential, may be limited by, 211, 212.

Of claim, whether incumbrancer need give, 228.

Registration under 1 & 2 Vict. c. 110, is not, *semble*, 230.

Purchasers without, judgments do not affect under 1 & 2 Vict. c. 110, 230.

Whether so, as regards Palatinate judgments, 240.

Of unregistered judgment, *ib.*

Of sale being in breach of trust, power to give receipts is no protection, 288.

Of money appropriated and lying idle, to save interest, 293.

Of deficiency in quantity, when not presumed, 307.

Of misdescription, bars claim to compensation, 309, 503.

Of copyhold disentailing assurance, 323, n.

Sub-purchasers with, vendor's lien prevails against, 345.

Alienees with, are bound by certain covenants, 361, 362.

To tenants to pay rent, a disturbance, 367.

Of claim, its effect, 395.

As to notice generally, Ch. XV. s. 5, pp. 402 to 427.

NOTICE—*continued*.

Alienees with, must perform vendor's contract, 462.

Of defect, at time of filing bill, does not bind purchaser to accept bad title, 531.

NOTORIOUS.

Local customs, need not be referred to in contract, 53.

NUISANCE.

Concealment of, by vendor's agent, 40.

On estate, purchaser when liable for, 430.

NUNC PRO TUNC.

Order for mortgagee to bid, made in Bankruptcy, 18, n.

OBJECTIONS. *See* DEFECTS.

To title, conditions as to, their effect, 67, 68, 70 to 73.

How affected by delay in delivery of abstract, 58, 146.

Condition limiting time for, fiduciary vendors may use, 77.

Negotiations upon, and waiver of, 215 to 220.

Expediency of reciting, in deed of confirmation, 254.

Equitable, a Court of Law considers, 457.

What are, for purposes of reference of title, 520.

Fresh, purchaser may take on fresh reference, 529.

Fair, not a ground for costs, 541.

Purchaser waiving, pays costs of, when, 544.

Improper, costs occasioned by, not allowed, *ib*.

OBSTRUCTION.

Of necessary way, a disturbance, 367.

OCCUPATION.

Of premises by purchaser, its effect on right to rescind, 11, 444.

Seisin not presumed from, as between vendor and purchaser, 167, 168.

Of premises by purchaser, yet compensation allowed for defects, 54, 307.

Notice of, notice of occupier's equities, 408.

Sed aliter as respects a past occupation, 410.

OCCUPATION RENT. *See* ACCOUNT, LEASEHOLDS.

OFFER.

For purchase by third person, false assertion of, by vendor, 44.

Party accepting, not liable for delays in post, 101.

Withdrawal, rejection, and acceptance of, 104, 105.

OFFICIAL.

Appointments, presumption of, 168.

OFFICE COPIES, AND EXTRACTS.

Are received as, but are not strictly, evidence, 154, 156.

OMISSION.

Of parcels from conveyance, purchaser when relieved, 383.

To make prudent inquiries, purchaser when not liable for, 412.

Of stipulations as illegal, binds the parties, 488.

OPENING BIDDINGS.

Allowed in Bankruptcy, 36.

Practice respecting, on sales in Chancery, 555 to 559.

Not usual, after Master's report confirmed, 560.

OPINION.

Puffing statements amounting to mere expression of, whether allowable, 43.

And see CASE, COUNSEL.

OPPRESSIVE.

Sale by mortgagee may yet be valid, 33.

OPTION.

Of purchase, as to declaring, 98, n. 480.

Of sale or purchase, declared, its effect on relative rights of donee's representatives, 122 to 126.

ORDER.

To pay purchase-money to third person, when irrevocable, 86.

Of the Courts of Chancery and Bankruptcy, and in Lunacy, has the effect of judgment, 238.

Of reference of title, 521, *et seq.*

ORIGINALS.

Loss of, when supplied by secondary evidence, 65.

Condition against production of, its effect, 67.

ORNAMENTAL TIMBER. *See* TIMBER.

OUTSTANDING INTERESTS.

How to be got in, and costs of, 246, 339.

Provisions in Lands Clauses Consolidation Act respecting, 429.

When a ground for reporting against title, 527.

OWNER. *See* STATUTORY OWNER.

Whether purchaser acting as, accepts title, 220, *et seq.*

Of estate sold by Court or his trustees, covenants, 260.

Beneficial devisee and executor selling as, implies no breach of trust, 289.

Of lands, party in possession selling to Railway Company, when deemed such, 312.

Adjoining, right of, to pre-emption, under Lands Clauses Consolidation Act, 360.

PALATINATE COURTS.

As to registration of judgments in, 239.

Whether such judgments are within 2 Viet. c. 11, and 3 & 4 Viet. c. 82, 240.

May make orders under the Trustee Act, 277.

Orders by, whether evidence under 45th sect., 280, n.

PARAMOUNT TITLE.

Purchaser asserting, need not give up possession, 222.

Eviction under, when within the usual covenants for title, 368.

And see ACCOUNT.

PARCELS.

Fiduciary vendors may sell in, 32.

Conditions as to identity of, 69.

Presumptions of identity of, 166.

How to be described in conveyance, 258.

Improperly included in, or omitted from conveyance, law respecting, 352, 383.

PARENT.

And child, contracts between, 355, n. (q), 356, n. (x).

Purchase in name of, not an advancement, 438.

PARISH.

Inhabitants of, cannot purchase *eo nomine*, 8.

PARSON.

And churchwardens, by custom a corporation to purchase land, 8.

PART.

"Any," trust to sell, extends to entirety, 32, n.

Material, of property, wanting, or no title shown to, defect is fatal, 64, 497, 505, 507.

Unspecified, of estate, notice of charge as affecting, 407.

Of estate, vendor when compelled to convey, 499, *et seq.*

PART-OWNER.

May enforce production of deeds, 202.

PART-PERFORMANCE.

Equitable doctrine of, not recognised at Law, 451.

What acts of, are or are not sufficient in Equity, 477 to 480.

Requisite, to set up subsequent parol variation, 488.

PARTICULARS.

Of sale, general matters relating to, 48 to 51.

preparation and contents of, 51 to 56.

on sale by Court, 552.

Of claim, may be required at Law, 456.

PARTIES.

- To conveyance, requisition as to, an objection to title, 72.
 who must be, 250, *et seq.*, 568.
- To contract, as between, it is in Equity a conveyance, 115.
- To suit for specific performance, 465 to 470.
- To suit cannot, without leave, bid at sale in, 550.

PARTITION.

- Deed, party claiming under, can enforce its production, 202.

PARTNER.

- Purchasing from co-partner, is entitled to what abstract, 134.
- As to lands purchased or held in partnership, 432, *et seq.*

PARTY, OR PRIVY.

- Effect of the words, 369.

PATENT.

- Defects, what are, vendor need not point them out, 39, 40.
- Ambiguity, evidence of intention cannot explain, 453.

PAYMENT.

- Terms of, agent of undisclosed principal may vary, 86.
- Of deposit. *See* DEPOSIT.
- Of mortgage debt, when presumed, 160.
- Of purchase money on completion, 310, *et seq.*
- Out of Court, of money paid by Railway Companies, 312.
 costs of, 337.
- To bankrupt, when protected, 396, *et seq.*

PEDIGREE.

- Matters of, should be abstracted in chief, 143.
- Presumption in matters of, 169 to 176.
- Evidence of matters of, 176 to 180.

PENALTY.

- On entry by Railway Companies before payment or deposit,
 225.
- Statutory, what is subject to, is unlawful, 454, n., 490.
- Insertion of in agreement, yet specific performance decreed, 496.

PENCIL.

- Signature is binding, 106.

PENDENTE LITE.

- Legal estate may be got in from unsatisfied incumbrancer, 391.
- Abstraction of subject-matter of suit, relief for, 534.

PERCH.

Statutory length of, 303.

Statement of perches and roods, its effect on the expressions
"more or less," &c., 308.

PERFECT.

Abstract is, when, 131 to 134.

PERFORMANCE.

Of covenants, condition as to evidence of, on sale of lease, 75.

Of plaintiff's engagements, when necessary before action, 449.

PERIODICAL PAYMENTS.

Arrears of, how long recoverable, 198.

PERMITTED, OR SUFFERED.

Effect of the words, 369.

PERSONAL ESTATE. *See* DEFICIENCY, MIXED FUND.

PERUSAL.

Of abstract, as to mode of, 148.

purchaser's solicitor, objecting to delay in de-
livery, should abstain from, 146.

Of conveyance, vendor pays for, 334.

PEW.

Right to, how shown, 138.

PLACE.

For production of deeds, 201, 202.

PLAINTIFF.

In Equity, whether he can vary contract by parol evidence, 50,
483.

PLAN.

Reference to in particulars, its effect, 54, 55, 308.

Words in, when counted for stamp duty, 333.

POLE. *See* PERCH.

PORTION.

Further, a consideration for settlement, 420.

POSSESSION.

Agreement to give up, for a money consideration, must be in
writing, 92.

Vendor in, after time fixed for completion, may get in crops,
&c., 116.

Purchaser in, before payment of purchase-money, restrained
from waste, 118.

when liable for use and occupation, if no title, 119,
448.

When title may be proved by evidence of, 142.

POSSESSION—*continued*.

- Title acquired by, under Statute of Limitations, 188 to 200.
- Evidently at once required, time is essential, 209.
- Undertaking to deliver, not binding in Equity, 210.
- When a waiver of title, 219, 220, 508, 564.
- Granting lease is equivalent to, 220.
- Purchaser in, his rights and liabilities, *ib.* to 223.
 - pays interest pending completion, when, 293 to 295.
 - ejectment of, a defence in Equity, 515.
 - when required to vacate, or pay purchase-money, 516, *et seq.*
- Vendor in, by altering property, may avoid contract, 223.
 - when liable to occupation rent, 297.
 - must account for receipts, and deteriorations, 306.
- By Railway Companies before completion, 224, *et seq.*
- Party in, his *primá facie* right to purchase-money paid into Court, 312.
- Of estate, or deeds, assignees omitting to take, yet not postponed, 396.
 - notice of holder's equities, 408.
- Given or taken, a part performance, 477.
- Retention of, whether a part performance, 478, 480.
- Wrongfully obtained, is unavailing, 479.
- Collateral parol agreement for, void, 487.
- Effect of, on costs, 546.
- Purchaser from Court, not allowed to take, without accepting title, 564.
 - taking without leave, accepts title, *ib.*
 - from what time entitled to, 566.
- Costs of motion for leave to take, and to pay money, 561.

POSSIBILITY.

- Mere, evidence to negative cannot be required, 163.

POST.

- Party sending letter by, is not responsible for delay, 101.
- Offer made by, binding, if at once accepted, 105.

POVERTY.

- Whether an excuse for *laches*, 25, 359.
- Of vendor, effect of, 353, *et seq.*

POWER.

- Collateral, infant may convey under, 2.
- Married woman may convey or contract under, 5, 463.

POWER—*continued*.

- To sell, conditional, exercise of, 30.
 - by auction, does not authorize private sale, 31.
 - to A., does not authorize sale to B., 32.
 - under special conditions, its effect, 78.
 - trustees not compelled to exercise, 464.
- Of auctioneers and agents, 80 to 87.
- Of vendor to manage estate, until completion, 115, 116.
- Instrument creating, should be abstracted, 141.
- Exercise of, defeats judgment under old, but not under new law, 233 to 235, 241.
- Defective execution of, relief against, 394, 463.
- Of revocation, settlement reserving, is fraudulent, 425.
- Contract under, enforced against remainderman, 461.
- To make substituted settlement, vendor not compelled to exercise, 499.

And see RECEIPTS.

PRÆMUNIRE.

- Effect of, on general right to sell, or buy, 6, 13.

PRAYER.

- For general relief, what relief obtainable under, 472.

PRAYER BOOK.

- Entries in, may be evidence of pedigree, 177.

PRE-EMPTION.

- Clause of, in lease, whether notice of the lease is notice of, 41.
- Right of, how not accepted, 98, n., *see* 480.
- Over superfluous lands, under Lands Clauses Consolidation Act, 359.

PRELIMINARY INQUIRIES.

- Whether sale by Court can be made before, 550.

PREMIUM.

- For lease, infant lessor obtaining by fraud, decreed to repay, 3.
- infant lessee, having occupied the property, cannot recover, 11.

PREJUDICE.

- Replies returned without, do not affect vendor's right to rescind contract, *semble*, 72.
- Act done to party's own, not a part performance, 482.

PRESCRIPTION ACT.

- Title under, 184 to 188.

PRESENTATION.

- Purchaser, claiming present right of, must accept title, 117.
- Right of, when barred by statute, 197.
- Injunction against, *pendente lite*, 519.

PRESENTMENT.

- Of copyhold assurance, dispensed with, 323.

PRESUMPTION. *See EVIDENCE.*

- Of instrument having been duly stamped, 111.
- Deficiencies in proof of documents, or of their attendant formalities, how far supplied by, 159 to 162.
- General rule of, between vendor and purchaser, 162.
- Deficiencies in proof of facts, not documentary, how far supplied by, 166 to 176.
- Under Lands Clauses Consolidation Act, of party in possession being owner, 312.

PRICE. *See CONSIDERATION.*

- Limited, agent exceeding, does not bind principal, 84.
- Bond of reference to settle, may amount to agreement, 98.
- Uncertainty respecting, is fatal to contract, 101.

PRINCIPAL. *See AGENT.*PRIORITY. *See CH. XV.*

- None is gained by notice to trustees, on purchase of equitable estate in land, 43, 229, 325.

PRISON.

- Contract executed in, held valid, 492, n.

PRIVATE.

- Contract, as to sale by, by fiduciary vendors, 31, 32.
 - preparation of agreement, on sale by, 96.
- Restrictions on agent's written authority, 84.

PRIVILEGED COMMUNICATIONS.

- Protected, 165, 414, *et seq.*

PRIVITY.

- Of estate, as respects covenants, 361, 364, *et seq.*

PRIVY.

- Effect of expression, in covenants for title, 369.

PROBATE. *See EXECUTOR.*

- Received as, but not properly evidence of title to freeholds or copyholds, 156.
- Should be seen to have issued from proper Court, 158.

PROBATE DUTY.

Not payable on share of partnership freeholds or copyholds,
433, n.

PROCEEDINGS.

At Law and in Equity, bankruptcy, &c., how proved, 155, 156.

PROCLAMATIONS.

Of fine, want of evidence of, supplied by statute, 155.

PRODUCTION. *See* CH. IX., AND COVENANT FOR PRODUCTION.

Of deeds : purchaser's right to, 65.

condition against, its effect, 67.

covenant for, runs with land, 362, 377.

by unpaid mortgagee, not compelled, 204.

unless he claim under mortgagor, who must himself
have produced them, *ib.*

or unless he consent to sale by Court, 205, 570.

Of title. *See* ABSTRACT, AND TITLE.

Of lease at sale, expedient, 75.

Of agreement, for purpose of stamping, enforced, 111, 453.

Of all documents of title in vendor's possession may be re-
quired, 140.

Of documents as negative evidence, 158.

Of cases, opinions, &c., 415.

PROFESSIONAL. *See* PRIVILEGED COMMUNICATIONS.

Usage, evidence of, to explain agreement, 452.

Adviser, agreement entered into without, enforced, 485.

deeds procured from party in absence of, set aside, 378.

PROFIT.

Trustee, &c., purchasing, and making, must account for, 22, 24.

PROMISE.

To accede to parol variation, whether enforced, 483.

when a defence in Equity, 485.

PROMISSORY NOTE.

Payment of deposit by, to auctioneer or agent, improper, 87.

Vendor's lien not affected by taking, 347.

Although stranger join therein as surety, *ib.*

PROMOTERS OF PUBLIC UNDERTAKINGS.

May convey to themselves, in certain cases, 275.

Can, in certain cases, dispense with concurrence of incum-
brancers, 283.

PROTECTION. *See* CH. XV.

PROTECTOR OF SETTLEMENT.

Consent by, 321, 322.

Costs of deed of, 334.

PROTEST.

Against delay, its effect, 214.

Payment under, 341, n. (z).

PUBLIC COMPANY.

Power of compulsory purchase by, when exercisable, 28.

Bound by offer of adequate, though unascertained, price, to statutory owner, 36.

Notice by, of intention to take land under compulsory power, how far an agreement, 98, 122.

May give second notice, 99, 118.

Contract by, how to be signed, 108.

Purchasing under compulsory power, pays for abstract, 131.

Entry by, before completion, 224, *et seq.*

Covenants by landowner with, 260.

Shares, &c., in, *ad valorem* duty on conveyance in consideration of, 256.

PUBLIC HOUSE.

Free, what is not, 56.

Deeds of, in London, usually mortgaged to brewers, 206.

Usual mode of payment for, 311, n.

PUFFING.

Statements by vendor, their effect, 43 to 46, 55.

On sales by auction, 89, 552.

PURCHASE. *See* COVENANTS and TRUST-MONEY.PURCHASE-MONEY. *See* CONSIDERATION, FUNDS.

Paid by wife, recoverable by husband, 12.

Person signing receipt for, liable as trustee, 38.

Payment of, to agent, &c., 86, 310.

Provisions respecting, on sale to railway companies, &c., 97.

Vendor's receipt for, may amount to agreement, 98.

Purchaser bound in Equity to pay, 114.

After payment of, yet purchaser is bound by notice of incumbrance before conveyance, 115, 390.

Judgment against vendor after contract, a lien on, 119, 233, 238.

And estate, vendor may keep, when, 119.

Relative rights of vendor's real and personal representatives to, if he die before completion, 121 to 124.

Real representatives of purchaser, when entitled to claim out of personal estate, on his death before payment, 125 to 128.

PURCHASE-MONEY—*continued.*

- Inability to give discharge for, a defect in title, 132.
- Vendor's suit for, is within 3 & 4 Will. IV. c. 27, s. 40, 198.
- Indorsed receipt for, unusual position of, to be explained, 206.
- Condition for payment of, on specified day, not an agreement for previous deduction of title, 208, *sed qu.*
- Apologies for non-payment of, an acceptance of title, 218.
- Parties interested in, whether to covenant for title, 262.
- Should not be paid before acknowledgment by married woman, 270.
- Discharge of incumbrances out of, 281, 381, 561.
- Purchaser's liability to see to application of, 283 to 292.
- Amount of, how increased or diminished, 293 to 309.
- To whom and how to be paid, 310, *et seq.*
- Payment into Court and reinvestment of, on sales to railway companies, and costs of, 312, 313, 337, *et seq.*
- Unpaid, vendor's lien for, 118, 344, *et seq.*, 267.
- Whether purchaser, not evicted, may claim, if title bad, 374.
- Payment of, procured by fraud, relieved against, 378.
 - notice of adverse right before, sufficient, 390.
 - whether material, as respects purchaser's liability to action for use and occupation, 448.
 - not a part performance, 478.
 - into Court, by purchaser in possession, 516, *et seq.*
 - by purchaser under decree, 561, 564.
 - ordered on motion, 572.
- Joint purchasers contributing unequally to, take in common in Equity, 432.
- Vendor cannot recover at Law, if no conveyance, 447.
- Application and distribution of, on sale under decree, 564, *et seq.*
- Purchaser under, &c., allowed compensation out of, after conveyance, 571.

QUALIFYING EXPRESSIONS.

- In statement of quantity, 308.

QUALITY.

- Of estate better than stated, no increase of purchase-money, 305.
- Deficient, compensation for, 309.
 - no remedy for, after conveyance, except under covenant, 363.

QUANTITY.

- Excess of, whether vendor can claim compensation for, 304.
- Not after conveyance, 351.

QUANTITY—*continued*.

Deficient, compensation for, 307, *et seq.*
 purchaser, after conveyance, can claim
 only under covenant, 363.

QUIETUS. *See* 2 & 3 Vict. c. 11, s. 9.

QUIT-RENT.

Need not be noticed by vendor of manorial freehold, *semble*, 53.
 Liability to, whether it admits of compensation, 506, 508.

RACK-RENT.

Leases at, need not be registered, 318; what are, *ib.*

RAILWAY COMPANY. *See* PUBLIC COMPANY.

Agreement to sell, or conveyance to, does not include mines,
 unless named, &c., 52, 97, 258.

Agreement for sale of shares in, not within fourth section of
 Statute of Frauds, 93.

And will be specifically enforced, 459, n.

Notice by, of intention to take land, its effect, 98, 122.

RE-ALLOTMENT.

Of estate bought by trustee, not admissible on purchase being
 set aside, and estate re-sold, 24.

Of estate sold by court, if biddings opened, 558.

RECEIPT.

For rent, usually made evidence on sale of leaseholds of per-
 formance of conditions, &c., 75.

For purchase-money, may constitute agreement, 98.

For deposit, not showing amount of purchase-money, no agree-
 ment, 101.

Inability to give, for purchase-money, a defect in title, 132.

Last, of rent, &c., time under 3 & 4 Will. IV. c. 27, runs from,
 189, 192.

Of rent, written acknowledgment of title equivalent to, 192.

Indorsed, should be examined on production of deeds, 206.

For purchase-money, all the trustees must join in, 290.

RECEIVER.

Not to be made a party to suit for specific performance, 465.

When appointed in suit, 518.

RECITAL.

Condition that recitals shall be evidence, effect of, 67.

Instrument appearing by, to be of suspicious character, must
 be produced, 68.

Of agreement, may amount to a contract, 100.

RECITAL—*continued*.

- Documents material to title should not be abstracted by way of, 143.
- Of deed, how far evidence, 153.
- Of lease for a year, 154.
- In renewed ecclesiastical lease, evidence, *ib*.
- How far evidence of pedigree, 177, 180.
- Conveyance, should contain what recitals, 252.
- Of vendor's title, whether purchaser estopped by, 253.
- Doubtful, does not operate by way of estoppel, 385.
- Of objections, in deed of confirmation, 254.
- Of sale and delivery of chattels, effect of, as respects stamp duty, 255.
- General, of limitations or trusts, notice, 407.
- Ambiguous, is not notice, 411.

RECONVEYANCE.

- Decreed on what terms, against purchasing trustee, 22, 23.
- And mortgage, not to be suppressed from title, 143.
- Of legal or mortgaged estate, when presumed, 159, 160.
- When decreed, for fraud, mistake, or inadequacy, 351 to 359, 378 to 381.
- On what terms, 358, 380.

RECORD. *See* COPIES.

- Instruments upon, may be verified by secondary evidence, 65.
- Purchaser whether entitled to copies, or covenants for production of, 263, 316.

RECOVERY DEED.

- Whether a sufficient root of title, 141.

RECOVERY AND FINE.

- Proof of, 154, 155.

RECTOR.

- Purchase of glebe by, invalid, 18.

RECTORY.

- How now affected by judgments, 233, 235.

REDEMPTION. *See* EQUITY OF REDEMPTION, LAND-TAX.

RE-ENTRY.

- Power of, deceptive statement respecting, 54.
- Incapable of being enforced, no objection to title, 527.

REFERENCE.

- To documents incorporated with signed agreement, must be clear, 102, 103.

REFERENCE—*continued.*

- As to terms of agreement, when directed in suit, 481.
- To Master under Trustee Act, 280.
- Of title, on motion before hearing, 519, *et seq.*
- Order of, subject-matter and form of, 521, 522.
- Proceedings on, 522 to 531.
- Purchaser's general right to, how waived, 531.
- Back, when ordered, 528.
- Purchaser requiring, and waiving objections, pays costs, 544.
- Costs of, on sale by Court, 563.

REFORMATION.

- Of executed deed, in Equity, 383.

REFUSAL.

- Of offer, cannot be retracted, 105.
- To discuss or accept title, by purchaser retaining possession, 221, 223, 547.
- To execute conveyance, no defence to action on security for purchase-money, 451.
- Of party to convey, 277, *et seq.*; 537, *et seq.*; 568, *et seq.*
- Of purchaser from Court to complete, 571, *et seq.*

REGISTER.

- Parochial and general, extracts from, how far evidence, 176.
- County, to be searched, 242.
- Is notice, only if searched, 406, 410.

REGISTRAR.

- District and general, difference between certificates of, 177, n.

REGISTRATION.

- Of judgments, 239, *et seq.*
- Of *lis pendens* and crown debts, 241, 242, 399.
- Of the conveyance, in County Register, 317, *et seq.*
- Of wills, when sufficient, 319.
- Acts, as to priority under, 399, *et seq.*
- Of appointment of assignees of bankrupts and insolvents, 398.

RELATION.

- Of trustee, &c., may purchase, 20.
- Statement by, is evidence of pedigree, 177.

REINVESTMENT.

- Of purchase-money, condition as to costs of, on sale by Trustees to Railway Company, &c. 36.
- Practice respecting, 313.
- Costs of, 337, *et seq.*

RELEASE.

- Order operating as a, under Trustee Act, 278, *et seq.*

RELEASE—*continued*.

- Notice of, when notice of the consideration for, 409.
- Of annuity, a consideration for settlement, 423.
- Of power of revocation, whether settlement thereby rendered valid, 425.
- A defence at Law and in Equity, 455, 514.
- Of existing right of action must be under seal, 455, n.

REMAINDER.

- Estates in, when Statute of Limitation begins to run against, 193, 194.
- Right of party entitled in, to production of deeds, 203.
- Man, cannot claim apportionment of damages for breach of covenants for title, 377.
- Specific performance enforced, by and against, when, 461 to 463.

RENEWABLE.

- Leaseholds, trustee of, cannot renew for his own benefit, 19.
- Condition against producing title to surrendered leases, 76.
- Such title must be shown, if no condition, 138.

RENEWAL. *See* FINE.**RENT.** *See* GROUND-RENT, RENT-CHARGE and RENTS AND PROFITS.

- Vendor misstating its amount is liable to action, 45.
- Condition for apportionment of, on sale of reversion, 60.
- or on sale of leaseholds, 76.
- Receipt for, generally made evidence of performance of covenants, &c., 75.
- What agreements respecting, must be in writing, 95.
- Landlord restrained from proceeding for, pending contract for purchase by tenant, 119.
- Old receipts for, when evidence of *seisin*, 167.
- What it includes, within 3 & 4 Will. IV. c. 27, 188, 193 n. (n).
- Right to recover, when barred by statute, 188 to 198.
- Arrears of, how long recoverable, 198.
- Receipt of, by wrongful claimant, confers title, when, 193.
- Retention of, by tenant, confers no title, 193.
- How affected by judgments, 231, 233, 235, 237.
- Covenant to pay, by purchaser of leaseholds, 265, 567.
- Notice to tenants to pay, a disturbance, 367.
- Purchaser's right to, after conveyance, 386.
- Security for, if leases set aside by vendor after conveyance, 418.
- Purchaser of, relieved against fraudulent determination of lease, 419.
- Additional, payment of, by tenant, whether a part performance, 478, 479.

RENTAL.

Of estate, signed and delivered, no agreement, 99.

RENT-CHARGE.

How affected by judgments, 231, 233, 235.

Of uncertain duration, estate conveyed in consideration of, no *ad valorem* duty, 256.

Costs, on sale in consideration of, 336.

Covenant to pay, whether it runs with land, 360, *et seq.*

Purchaser of part of, may distrain, 386.

Contribution, where estates subject to, 429.

Liability to, whether it admits of compensation, 506, 508.

RENTS AND PROFITS. *See* ACCOUNT.

Receipt of, by infant purchaser on coming of age, amounts to election, *semble*, 10.

Trustee, &c., purchasing, must account for, 23.

Of estate devised in trust for sale, right of tenant for life to, 31.

Vendor entitled to, up to time fixed for completion, 115.

So are his real representatives in case of his death, 121.

Written acknowledgment of title from person in receipt of, equivalent to possession under 3 & 4 Will. IV. c. 27, 192.

Purchaser may make vendor account for, during delay, 294, 306.

in possession of, must pay interest, when, 204 *et seq.*
from Court, when entitled to, 566.

REPAIRS. *See* ACCOUNT, EXPENDITURE.

Of church chancel, liability of estate to, a fatal defect of title, 52, 506.

State of, gross misstatement respecting, considered fraudulent, 63.

Joint purchaser has a lien for money expended in, 434.

REPLY. *See* OFFER, REFUSAL.

To purchaser's objections, its effect on condition for rescinding, 72.

REPORT.

In favour of title, 528, 529.

Against title, 530, 531.

Of purchase, on sale by Court, purchaser's rights, &c., before confirmation of, 554, *et seq.*

Need not be that highest bidder is the purchaser, 554.

Confirmation of, mode of procuring, and purchaser's rights and liabilities after, 559, *et seq.*

Party conducting sale may procure, if purchaser makes default, 572.

REPRESENTATIVES.

- Real and personal, of vendor or purchaser dying before completion, their relative rights, 121 to 128.
- Of covenantee, rights of, on breach of covenant, 373.
- Of vendor and purchaser, rights and liabilities of, at Law and in Equity, in respect of breach of contract, 448, 461 to 465.
- What are proper parties to suit, 468 to 470.
- Of purchaser from Court dying before confirmation, cannot, without suit, be compelled to complete, 555.

REPUGNANCY.

- In descriptions of parcels, usual condition as to identity, does not provide for, 69.

RE-PURCHASE.

- Conveyance with power to, when not a mortgage, 388.

REQUISITIONS. *See* OBJECTIONS.

- On title, condition respecting, 58, 72.

RE-SALE.

- Of property purchased by trustee, &c., 22.
- Ordered, on what terms, 23, 24.
- Fiduciary vendors, buying in estate without authority, bear loss upon, 37.
- Condition for, on default by purchaser, 73.
 - may be used by fiduciary vendors, 77.
- Of estate, whether a waiver of title, 218.
 - by vendor, *pendente lite*, when restrained, 518.
- Decree in vendor's suit, may direct, and that purchaser pay deficiency, 535.
- Similar order made if purchaser from Court make default, 572.
- Petition for, on bankruptcy of purchaser, 121.
- By purchaser from Court, before confirmation, 555.

RESCINDING. *See* ACCOUNT.

- Contract, condition for, its effect, 71.
 - benefit of, how lost, 72.
 - by party solely bound, on refusal of other party to elect, 105, 489.
 - in vendor's lifetime, effect of, on prior devise, 123.
 - on ground of delay, must be preceded by notice, 212.
 - by purchaser, his remedies at Law, 443, 445.
 - asserting paramount title, he need not quit possession, 222.
 - right of, how lost by altering property, 223.
- Sale by vendor, after conveyance, 351 to 359.
 - purchaser, after conveyance, 378, *et seq.*

RESERVED BIDDING.

Fiduciary vendors have no implied authority to fix, 35.

If intended, should be noticed in particulars, &c., 51, 57.

Allowable in Equity, but *semble* not at Law, except on notice, 89.

On sale by Court, must be by leave, 552.

RESIDENCE.

Unexpressed intention to use property for a, does not make time essential, 210.

Purchaser of, delaying to complete, pays interest, though out of possession, 293.

RESTRICTION.

On due enjoyment of property, not matter for compensation, 64, 506.

Private, on agent with written authority, does not affect parties without notice, 84.

RESTRICTIVE WORDS.

Effect of, in covenants for title, 371, *et seq.*

RESTS.

Directed, in case of fraud, 381.

Against evicted purchaser, unusual, 426.

RESTORATION.

By purchaser, of altered premises, compelled, 223, 381.

RESULTING TRUST. *See* ADVANCEMENT.

Not within the Statute of Frauds, 436.

Custom, *contra*, bad, *ib.*

Sustained or rebutted by parol evidence, *ib.*, 441.

RETAINER.

Client, whether affected by notice to solicitor before, 413.

RETENTION.

Of abstract, a waiver of delay in its delivery, 146.

showing imperfect title, when a waiver of time for completion, 214.

Of rent by tenant, gives him no title against reversioner, 193.

Of incumbrances out of unpaid purchase-money, 282, 381.

Of deeds by vendor, its effect, 345, 395.

Of possession by purchaser, and refusal to discuss or accept title, 221, 223, 547.

RETRACTION.

Of bidding allowable, condition against, 57.

Of offer, allowable before acceptance, 104.

RETURN.

Of deposit, when ordered in Equity, 88, 538.

REVERSION.

May be sold under trust in settlement, although parties' rights thereby altered, 30.

Lease, how far notice on sale of, 41.

Purchaser contracting for, must inform vendor of death of tenant for life, 46.

Condition for apportionment of rent, on sale of, 60.

Misstatement on sale of, what not matter for compensation, 64.

Condition against evidence of adequacy of original price, on re-sale of, 76.

Dropping of lives, enures to benefit of purchaser of, 116.

Abstract of title to, must go back to its creation, 139.

Rights of owner of, where saved under Prescription Act, 186.

how affected by 3 & 4 Will. IV. c. 27, 193,
et seq.

to enforce production of title deeds, 203, 204.

Time generally essential, on sale of, 209.

Subject to judgments, 231, 233, 235.

Assurance of, by married woman, 273.

Wasting of particular estate, on sale of, equivalent to possession, 295, 566.

On sale of, whether vendor's lien affected by bond, 349.

Sale of, when set aside for inadequacy of consideration, 354,
et seq.

Contract for sale of, not enforced, &c., 512.

Purchaser of, his rights after conveyance, 386, 387.

Trustees for sale of, need not adopt tenant for life's contract, 464.

Sale of, with abatement, enforced against vendor contracting to sell the fee, 502.

Instead of estate in possession, purchaser need not take, 505.

Person entitled to, may bid on sale by Court, 551.

REVERSED DECISION.

Does not render title doubtful, 525.

REVOCATION.

Of auctioneer's authority, 83, 86.

Of devise, by contract for sale, 121, *et seq.*

Power of, settlement reserving, is fraudulent, 425.

RIGHT.

Time of accrual of, within 3 & 4 Will. IV. c. 27, 189.

Unlikely to be enforced, whether title therefore bad, 526.

RING-FENCE.

Land falsely described as being in, whether compensation claimable, 309.

ROMAN CATHOLICS.

May buy and hold land, 13.

ROOD.

Statutory contents of, 303.

ROOT OF TITLE. *See* TITLE.

RULE OF COURT.

For payment, equivalent to judgment, 238.

SALES-BOOK.

Entry in, by auctioneer, an agreement, 83.

SATISFACTION.

Of breach of contract, matter accepted in, a defence, 455.

SATISFACTORY.

Means "marketable" title, 71.

SATISFIED TERMS.

Title to, must be abstracted, 136.

Presumption of their surrender, 160, n.

Act for merger of, 248.

SEAL.

Loss, or want of, 154, n., 156.

SEAL-DAY.

Master's report of sale must be confirmed absolutely on, 560.

SEARCHES.

Conditions as to expenses of, 70.

For incumbrances, what and when to be made, 229 to 243, 243.

Costs of unnecessary, not allowed, 244,

Expenses of, when recoverable at Law, 446.

SEAS.

What not beyond, within 3 & 4 Will. IV. c. 27, 188, n.

SECRET.

Trust, equitable mortgagee bound by, 393.

SECURITY. *See* MORTGAGEE.

Auctioneer or agent cannot take, for deposit, &c. 81.

To be given by Railway Companies before entry, 222, 225.

Taking for purchase-money discharges lien, when, 346, *et seq.*

For purchase-money, vendor refusing to convey may sue on, 451.

SEISIN.

- Livery of, when presumed, 161.
- Presumption of, and of its continuance, 167, 168.
- Benefit of covenants for title, runs with, 364.
- Covenants for, how broken, 367.

SEPARATE DEED.

- Whether purchaser can require outstanding interests, &c. to be got in by, 246, 247, 339.
- Covenants, when to be entered into by, 262, 263, 370.
- Annuity consideration secured by, vendor's lien held to be discharged, 349.

SEPARATE ESTATE.

- Married woman, may bind by contract, 5, 12, 465.

SEPARATION.

- Voluntary, child born during, is legitimate, 169.
- Deed, how supported against creditors, 420.

SERVICES.

- What equivalent to rent, within 3 & 4 Will. IV. c. 27, s. 8, 192.

SET-OFF.

- Payment to auctioneer or agent by way of, invalid, 87, 310.
- Of vendor's expenses unnecessarily caused by purchaser, whether any, 216.
- Of deposit, against costs ordered to be paid, refused, 547.

SETTLEMENT.

- Inquiry should be made as to, if vendor is married, 163.
- As to custody of, on sales under, 314, 315.
- Protector of, his consent to disposition by tenant in tail, 321, 322.
- Is notice of articles, 407.
- Voluntary, is fraudulent as against purchasers, 420.
 - what is so considered, *ib. et seq.*
 - may be supported by matter *ex post facto*, 424.
 - who may set aside, *ib.*
- Revocable, is fraudulent, &c. 425.
- Or to defraud creditors, 426.
- Investment by father of his own moneys on trusts of, an advancement, 440.
- Contract for sale by voluntary settlor may be enforced against, but not by him, 462.

SHARES.

- Undivided, of estate, fiduciary vendors should not sell, 33.
- In companies, what within 4th section of Statute of Frauds, 93.
- In mines, title to be shown to, 138.
- Railway, specific performance of contract to sell or buy, enforced, 459, n.
- In estate, vendor when forced to convey, 500.
 - purchaser contracting for entirety need not take, 505.

SHEEP-WALKS.

- Instead of freehold, purchaser need not take, 504.

SIGNATURE.

- Of agreement by attorneys or agents, 85, 444.
 - bill need not allege, 471.
- Of agreements, generally, 105 to 108.
- Of steward, when to be proved, 150.
- Of Judge, 155.
- To deeds, when presumed to be genuine, 161.

SOLICITOR. *See* PRIVILEGED COMMUNICATIONS.

- As to purchases by, 18, 19.
- Inducing purchaser to accept defective title, liability of, 42.
- May not disclose defect in client's title to client entitled, 149.
- Lien of, on mortgage deed, its extent, 204.
- Bound by undertaking to pay costs of mortgagee's solicitor, on his giving up deeds, *ib.*
- Purchasing, cannot object to title which he accepted for client, 215.
- Must search for incumbrances, 229.
- Liability of, to client, in respect of covenants in conveyance, 258.
- Vendor's, has no lien on conveyance for costs, 267.
- Of trustees, purchase-money should not be paid to, 310.
- Unnecessarily preparing cannot claim costs of conveyance, 340.
- Bill of, for costs, taxation, &c., of, *ib. et seq.*
- Conveyance, &c., procured from client in absence of, set aside, 378.
- Notice to, is notice to client, 402, 413.
- Of party conducting sale under decree, is considered as acting for all parties, 551.
- Deposit ordered to be paid to, 553.

SON. *See* ADVANCEMENT, FAMILY ARRANGEMENT.

- Of trustee may purchase trust estate, 20.
- Vendor not generally ordered to procure concurrence of, 498.

SPECIAL CONDITIONS. *See* CONDITIONS.

SPECIALTY DEBT.

Purchaser from heir or devisee need not see to payment of, 292.

Purchase-money ordered to be paid, is provable as, 535.

See Ch. XVIII.

SPECIFIC PERFORMANCE. *See* Ch. XIX.

Relation of trustee, purchasing, can enforce, 20.

Assignee of insolvent, selling below reserved price, can enforce, 35.

Fiduciary vendors are liable to costs in suit for, 38.

Right to, how affected, by statements, &c., before sale, Ch. III.
by particulars and conditions of sale, Ch. IV.

Return of deposit, when directed in suit for, 88, 538.

Liability or right of either party to, at time of his death before completion, is the test of the rights of his representatives, 121 to 128.

Costs of suit for, not recoverable as damages at Law, 446.

Suit for, and action, plaintiff must elect between, 456.

SPECULATION.

Property bought for purposes of, does not survive in Equity, 433.

SPORTING.

Right of, over estate, does not admit of compensation, 52, 506.
when a right of profit à *prendre*, 185.

STAMPS.

On agreements, 109, *et seq.*

Presumption respecting, in case of lost instrument, 110, 161.

Examined copies of Court roll, do not require, 151, n.

On conveyance, 254 to 257, and 325 to 334.

On memorial of registration, 319.

On copies of Court roll, steward has affixed, 330.

Production of agreement, for stamping, when compelled, 453.

Need not be alleged, in bill, 471.

STATEMENTS.

In conditions, must be proved, 73.

STATUTE OF FRAUDS.

Auctioneer is an agent within, 83.

What sales are within, 91.

Written agreement, when necessary under, 91 to 96.

What a sufficient agreement within, 97 to 105.

What signature sufficient, 105 to 108.

STATUTE OF LIMITATIONS.

General provisions of, 188 to 198.

Purchaser must accept title under, *semble*, 199.

Possession under, bars the right and not only the remedy, 200.

STATUTORY.

Forms of conveyance, ineligible, 247.

STATUTORY OWNERS.

Enabled to sell, 6.

Who are, 27.

May sell, within what time, 28.

Can sell only for gross sum, 35.

Cannot fix the price, except provisionally, 36.

As to covenants for title by, 260, 261.

Refusal, &c., of, to convey, purchaser's remedies in case of, 275.

Payment, &c., of purchase-money, on sale by, 311 to 313.

Costs on sales by, 336, *et seq.*

Rights of pre-emption of, under Lands Clauses Consolidation Act, 359.

STATUTORY REMEDY. *See* MANDAMUS.

STEWARD.

Obtaining lease from employer, must prove its fairness, 18.

Of manor, whether evidence of handwriting of, can be required, 150.

Custom for, to prepare all surrenders, valid, 245.

Is to indorse acknowledgment on deed of consent, by protector of settlement of copyholds, 322.

Is to enter assurances on court rolls, 323, 324.

Fees of, 324, 330, 335.

Are not taxable under 6 & 7 Vict. c. 73, 342.

Is to deliver stamped copies of Court roll, 330.

Not, as such, to be made party to suit, 465.

STIPULATION. *See* PROMISE.

Material, under agreement, inability of plaintiff to perform, a defence in equity, 515.

STOCK.

Consideration, now pays *ad valorem* duty, 256, 323.

Contract for sale of, not specifically enforced, 459.

STOCK OF DESCENT.

Presumption respecting, 169.

STRANGER.

When liable for misrepresentation, 45.
or for slander of title, 47.

STRANGER—*continued*.

To contract, equities under, cannot be enforced against, before conveyance, 115.

not generally a proper party to suit, 466.

Agreement brought about by, with fraudulent object, yet valid as between parties, 493.

SUB-LESSEE.

Has implied notice of title, of immediate and original lessors, 409.

SUBMISSION.

By defendant to plaintiff's demand, its effect on costs, 545.

SUB-PURCHASER.

With notice of, is affected by incapacity of original purchaser, 22.
vendor's lien is valid against, 345.

Cannot vary conditions of sale, &c., as against original purchaser, 50.

Stamp duty on conveyance to, 330.

Not a necessary party to suit for specific performance of original contract, 470.

On sale by Court, before confirmation, rule as to, 555.

SUBSEQUENT.

Events, do not affect trustees' power, or want of power to give receipts, *semble*, 286, *et seq.*

Title, acquired by vendor, &c., he must convey to purchaser, 383.

Enrolled assurance, under 3 & 4 Will. IV. c. 74, confirms prior voidable estate, 385.

Acts, &c., what may rebut presumption of advancement, 439.

SUBSTITUTION.

Of purchaser from Court, on what terms allowed, 561.

SUBTERRANEAN.

Entry, by Railway Company, before payment or deposit, illegal, 224.

SUIT.

In equity, a disturbance, 367.

is within 3 & 4 Will. IV. c. 27, 188, 198.

Commencement of, what is, 188, n.

Pendency of, whether an objection to title, 525.

SUPERFLUOUS.

Lands, taken by Railway Company, right of vendor, in respect of, 359.

SURETY.

Joining in bill, note, or bond, whether vendor's lien affected,
347.

SURFACE.

Deficiency, on sale of woods, what compensation for, 309.

SURPRISE.

When a ground for rescinding executed contract, 354.

Not, in general, a ground for enforcing parol variation, 483.

A ground of defence in Equity, 484, 492, *et seq.*, 510.

Not a ground for opening biddings after confirmation, 560.

SURRENDER. *See* STEWARD.

Of lease, agreement for, when to be in writing, 93.

Of copyholds, when presumed, 159, 160.

Of satisfied terms, when presumed, 160, n.

Vendor of copyholds must, if possible, make in person, 269.

Purchaser of copyholds, pays for, 335.

SURVEY.

Of estate, expenses of, allowed, on opening biddings, 558.

SURVEYOR.

Valuation of estate by, falsely asserted, its effect, 44.

SURVIVORSHIP. *See* JOINT PURCHASERS, VACANCY.

Presumption as to, 173, 174.

SUSPICION.

Mere, of fraud, is not notice, 411.

Nor ground of objection to title, 525.

TAIL. *See* TENANT IN TAIL.

Estate in, and remainders on, how affected by 3 & 4 Will. IV.
c. 27, 194 to 196, 197.

How affected by judgments, 231, 234, 236.

Contract for sale of, not enforced against issue or remaindermen, 463.

TAXATION.

Of costs, under 6 & 7 Vict. c. 73, 340, *et seq.*

under the Court's general jurisdiction, 343.

under 8 & 9 Vict. c. 119, *ib.*

TENANCY.

Of purchaser, how affected by contract, 119.

ceases, on conveyance, 387.

Notice of, is notice of tenant's interests, 229, 408.

but not of lessor's title, 410.

Past, notice of, is not notice of tenant's interests, *ib.*

Of vendor, notice of, is no notice of lien, when, 411.

TENANT.

- Agreement with, when within Statute of Frauds, 92 to 95.
- Deteriorating acts of, vendor is liable for, 307.
- Vendor ejecting, purchaser may claim compensation, *ib.*
- Occupying, purchaser being, may claim compensation for misdescription, *ib.*
- Notice to, to pay rent, a disturbance, 367.
- Liability of, to purchaser of reversion, 386.
- What acts by, are a part performance, 477, *et seq.*

TENANT AT WILL.

- How affected by Statute of Limitations, 191.
- Who is, within the statute, 191, 222.

TENANT FOR LIFE.

- May purchase from trustees of settlement, 20.
- Right of, to rents of estate directed to be sold, 31.
- Power of, to consent to sale, how affected by alienation, charges, &c., 35, n.
- Actual, or imminent death of, must be disclosed by intended purchaser of reversion, 46.
- Death of, after contract, gain by, belongs to purchaser of reversion, 116.
- Liability of, to covenant for title, 260, 261.
- And reversioner, sale by, is treated as of an estate in possession, 355.
- May sue for breach of covenants for title, 366.
- Remainderman has no claim on damages recovered by, 377.
- Concurrence of, in settlement, when a consideration, 421, 423.
- Contract by, under power, enforced against remaindermen, 461.
- not under power, trustees for sale need not adopt, 464.
- Under vendor's will, a necessary party to suit, 469.
- Not compelled to procure a title, 491, 499.
- When not compelled to convey partial interest, 499, 501, *et seq.*
- May buy, on sale by Court, 551.

TENANT FROM YEAR TO YEAR.

- How affected by Statute of Limitations, 192.

TENANT IN COMMON.

- One purchasing of another, what abstract to be furnished, 134.
- Possession of one, does not save right of another, 193.
- Must perform the contract for sale, as respects his own share, 501.

TENANT IN TAIL.

- In possession, whether abstract showing vendor to be, shows a good title, 133.
- Statutory bar against, its effect on issue and remaindermen, 194 to 197.
- Assurances by, 321, 322.
- Induced by fraud to bar the entail, remedy of remainderman, 358.
- Confirmation of voidable estate by, 385.
- Contract by, does not bind issue or remaindermen, 394, 463.
- In remainder, decreed to convey base fee, and covenant to bar remainders when practicable, 498.

TENDER.

- By mortgagor, necessary to prevent sale by mortgagee, 33.
- Of payments of annuity, when material to rights of purchaser on death of *cestui que vie*, 117.
- Of conveyance and purchase-money, by purchaser, before action, 449.

TENURE.

- Misstatement of, does not admit of compensation, 63, 504.
- Lands of every, except ancient demesne, are included in 1 & 2 Vict. c. 110, s. 13, 237.
- Variation in, is a breach of covenant for seisin in fee, 367.

TERMS. *See* EVIDENCE.

- Of contract must be fixed by, or deducible, from written agreement, 101, *et seq.*
- plaintiff, how far bound to show, 481.

TERM FOR YEARS. *See* LEASE, LEASEHOLD, MARRIED WOMAN.

- Bequest of, how affected by purchase of reversion, 128.
- Old, what title to, must be abstracted, 139.
- Satisfied, title to, must be abstracted, 136.
 - assignment or surrender of, when presumed, 160.
 - act for dispensing with assignment of, its effect, 248.
 - protected purchaser, without notice, from judgments, 232.
 - aliter* under new law, 234.
- Beneficial, how affected by judgments, 231, *et seq.*
- Termor contracting to sell the fee, must assign, 501.
- Instead of fee, purchaser need not accept, 504.
- Nor short, instead of long, 505.

TIMBER.

- What trees are, 61.
- Ornamental, effect of felling, 11, 116, 224.
- Standing, trustees must sell with estate, 33.
- Condition for payment for, 61.
- Agreement for sale of, when to be in writing, 94.
- Felled, &c. after contract, belongs to purchaser, 116, 306.
- Fall of, by purchaser in possession before payment, restrained
118, 220.
- a reason for purchase-money being paid into Court, 516.
- Price of, is subject to stamp duty, as part of the consideration,
255, 327.
- interest upon, when payable during delay, 295, *et seq.*
- Compensation for surface deficiency, on sale of timber estate,
308.
- Standing, on sale of, by Court, separately from estate, a deposit
is usually required, 552.
- Price of, included as part of price of estate, on opening biddings,
556.

TIME.

- What, allowed for election by infant purchaser, 10.
- for impeaching purchase by trustee, &c., 25.
- For sale by fiduciary vendors, 27 to 31.
- For delivery of abstract, and completion, conditions as to, 58,
72, 131.
- For objecting to title, conditions limiting, 70 to 72, 146.
- may be used by fiduciary vendor, 77.
- For acceptance of offer, 105.
- Of death, presumption as to, 173.
- Registers when evidence of, 176.
- For examination of deeds, 147, 202.
- Essential at Law, and when in Equity, 208 to 215, 456.
- Its effect, in considering the sufficiency of acts of part per-
formance, 478.
- What lapse of, sufficient to bar relief in Equity, 514.
- For sale by Court, 549.
- Fixed for sale by author of trust, Court cannot in general anti-
cipate, 551, 571.

TITHE.

- What title to, should be abstracted, 139.
- Commutation of, 181.
- Exemption from, or modus, how proved, 182.
- How affected by Statute of Limitations, 183, 188.
- How affected by judgments, 231, 233, 235.

TITHE—*continued.*

Liability to, a fatal defect, if estate sold as tithe-free, 506.

Unless freedom from tithe seems to have been no part of the inducement to the purchase, 509, *sed qu.*

TITHE-FREE.

Title to estate sold as, 140.

TITLE. *See* TIME.

Fiduciary vendors must show a marketable, 37.

As to disclosure of defects, &c., in, by vendor, 41.

Want of, to material part of estate, 64.

Conditions respecting, 66 to 72, 74 to 78.

"Satisfactory," means "marketable," 71.

Purchaser claiming accruing benefit to estate, when bound to accept, 117.

When perfect, 131 to 134.

What to be abstracted, in various cases, 134 to 140.

Abstracted, acceptance of, its effect, 149.

Defects in client's, not to be disclosed to another client, 149.

Under Tithe Commutation, Prescription, and Limitations Acts, 181 to 200.

Objections to, negotiations upon, and waiver of, 215 to 220.

Possession, when a waiver of objections to, 219.

Waiver of objections to, by acts of ownership, 220 to 223.

Fiduciary vendors, whether bound to covenant for, 262.

Owners or incumbrancers not making, power of purchasers under Lands Clauses Consolidation Act, 1845, 276, 283.

As to payment of interest during delay in making out, 293 to 302.

Affidavit of, on petition for payment of purchase-money out of Court, 312.

To land proposed for reinvestment, must be examined by Master, 313.

Statutory vendor's costs of making out, Railway Companies, &c., pay, 336.

Defects in, vendor until conveyance must make good, 281.

purchaser's general remedies for, after conveyance, depend on vendor's covenants, 363.

purchaser neglecting to investigate, has notice of, 406, 408.

Defective, purchaser accepting, through fraud of vendor, relieved, 379.

New, acquired by vendor, purchaser's right to, 383, 384.

Lessor's, lessee has notice of, 409.

how far purchaser from lessee has notice of, 410.

TITLE—*continued.*

Want of, contract going off through, purchaser can claim what damages, 447.

whether he is liable for use and occupation, 448.

Time for showing, in action at Law, 457.

Equitable objections to, entertained at Law, *ib.*

Want of, in plaintiff, when a defence on the ground of non-mutuality, 494, *et seq.*

when a vendor's defence, 498 to 504.

when a purchaser's defence, 504 to 510.

Reference of, and proceedings thereon, 519 to 523.

on purchase under decree, 562, 572.

What may be required on reference, 523 to 527.

or by purchaser under decree, 562.

Bad, purchaser after great delay not forced to accept, 531.

Costs, how affected by questions of, 540, *et seq.*

TOMBSTONE,

Evidence of pedigree, 178.

TOWN.

What is a, 359, n.

TRADE.

In contract for property connected with, time generally essential in Equity, 209, 210.

Vendors held to carry on, at their own risk, 297.

Property purchased for purposes of, does not survive in Equity, 432, *et seq.*

Usage, evidence of, in explanation of agreement, 452.

TRADITIONAL EVIDENCE.

Receivable in matters of pedigree, 177 to 179.

TRAITORS.

How far disqualified to sell or buy, 6, 13.

TRANSFER.

Written, of parol agreement, when a valuable consideration, 93

TREATY.

For purchase, relative duties of parties during, 39 to 47.

And agreement, test of difference between, 104.

TRUST.

When not to be disclosed on abstract, 144.

How affected by Statute of Limitations, 190, 191.

Vendor's lien for purchase-money, is not an express, 190, n., 345.

Estates held in, how affected by judgments, 231, *et seq.*

Property, improperly sold, becomes reimpressed with, when, 426.

Declarations of, and agreements, distinguished, 435.

Resulting, on purchase in name of stranger, 435, *et seq.*

TRUSTEE. *See* TENANT FOR LIFE.

- Purchases by, voidable, rules as to, 19 to 26.
- As to sales by, 27 to 38.
- Inquiry of, and notice to, as to incumbrances, and of completion, 43, 228, 325, 393.
- Cannot allow compensation for his own mistakes, 65.
- Use of special conditions by, whether allowable, 76 to 78.
- Acting as auctioneer, cannot charge commission, 82.
- Of estate, vendor is, for purchaser after contract, 114.
- Provisions respecting, in Statute of Limitations, 190, 191.
- Acknowledgment of title by, bars *cestui que trust*, 192, n.
- Covenants, on sale by, 261, 262.
- Bound to convey at request of *cestui que trust*, 276.
- Conveyance from, under Trustee Act, 1850. *See* CONVEYANCE.
- Purchaser from, when bound to see to application of purchase-money, 283 to 292.
- Purchase-money, how to be paid, on sale by, 310.
- Can make good title to purchaser without notice, 390.
- Legal estate got in from, when available, 391.
- Contract by, enforced against *cestuis que trust*, unless it be in breach of trust, 463.
- Agreement by, to exonerate estate, not enforced against, 491.

TRUST-MONEY.

- Purchaser when liable to see to application of, 283 to 292.
- Land purchased with, becomes impressed with trust, 441, 442.
- Evidence of purchase with, 441 ; *and see* *Trench v. Harrison*, 17 Sim. 111.

UNASCERTAINED.

- Cestuis que trust*, trustees for, can give receipts, 284.
- Interest under expected inclosure award, sale of, at inadequate price, supported, 511.

UNAVOIDABLE.

- Obstacle, whether delay in making out title is an, 299.

UNAUTHORIZED.

- Agent, acts of, may be adopted, when, 86.
- Acts, by agent, bind principal, when, 84.
- Agreement by agent, his liability on, 85.

UNCERTAINTY.

- In material terms of agreement, fatal, 101, 102, 481.
- Of amount of consideration, whether material, as respects the question of adequacy, 354, 511.

UNDERLEASE. *See* SUB-LESSEE.

Effect of agreement by lessor to purchase, 129.

Instead of lease, purchaser need not accept, 504.

UNDERTAKING.

For delivery of possession, not enforced in Equity, 210.

By solicitor, for payment of costs, enforced summarily, 205.

UNTENABLE.

Objection made and persisted in, vendor, under condition, may rescind contract, 71.

Requisitions, danger of, 216.

USAGE.

Modern, may show what passed under ancient grant, 167, n.

USE AND OCCUPATION.

Purchaser, when liable for, 119, 222, 448.

may sue for, when, 120, 223, 387.

USUAL.

Covenants, what are, 259.

should not be described as, in particulars, 75.

USURY.

Condition for payment of rent, in lieu of interest, is not, 60.

VACANCY.

Occurring, pending contract for sale of advowson, 117.

In trust, directed to be filled up, whether surviving trustees can give receipts, 290.

Of possession, no notice of vendor's want of title, 411.

VALUATION.

As to fixing price of land by, under Lands Clauses Consolidation Act, 36.

Misstatement of by vendor, its effect, 44.

Of timber and fixtures, as to interest on amount of, 295, 296.

amount of, is subject to *ad valorem* duty, and must be stated in conveyance, 255, 327.

VALUE.

Alteration in, after contract, 116, 117.

Fluctuating, of property, may make time essential, 209.

Relative, of covenants, Court will not determine, 418.

VALUERS.

Under Commons Inclosure Act, cannot buy lands in parish, 17

VARIATION. *See* FUNDS.

Parol, of conditions, &c., generally inadmissible, 49.

VARIATION—*continued.*

- Of contract, by auctioneer or agent, 81, 86.
- Of offer, in reply, amounts to a refusal, 105.
- Parol, of contract, inadmissible at Law, 451, 456.
 - whether admissible on behalf of plaintiff in Equity, 483.
 - is admissible on behalf of defendant in Equity, 484 to 488.
 - proved by defendant's agent, plaintiff allowed to take decree with, 533.
 - offered by bill, defendant may elect to take decree with, 534.
 - proved by defendant, he may take a decree with, when, *ib.*

VERBAL.

- Declarations at sale, their effect, 49, 50.
- Appointment of agent, inexpedient, 83.
- Agreements. *See* STATUTE OF FRAUDS.
- Enlargement of time, bad at law, 213, 456.
- Waiver of contract not under seal, whether a defence at Law, or in Equity, 455, 514.

VERIFICATION.

- Of abstract, vendor's liability respecting, 65.
 - not excluded by condition against production, 67.
- Conditions respecting, 67 to 69.
- Should be at vendor's expense, on sale in lots, 70, 77.
- What evidence necessary for, 149 to 200.
- Delay in, effect of, as to interest, 302.

VEXATIOUS.

- Re-investments, costs of, not allowed, 339, n.
- Objections to title, reference refused, on ground of, 521.
- Conduct, its effect on costs, 541.

VOIDABLE.

- And void assurances by infant, distinguished, 2, n.
- Estate, created by tenant in tail, how confirmed, 385.
- Or void, agreements, &c., purchaser how far bound by notice of, 416 to 419.
- Leases, whether vendor may set aside, for his own benefit, 418.

VOLUNTARY.

- Trust for payment of creditors, whether within the 3 & 4 Will.
 - IV. c. 27, s. 25, 190.
- Settlements, Law respecting, 420, *et seq.*

VOLUNTARY—*continued*.

Settlor, selling, specific performance can be enforced against, but not by him, 462, 490.

VOTES.

Splitting, *bonâ fide* purchase with view to, valid, 113.

WAIVER.

Of time fixed for delivery of abstract, 146.

generally, 213, 214.

Of title, and objections to title, 215 to 221, 246.

Verbal, of parol contract, whether sufficient at Law, 455.

Of contract, what sufficient as a defence in Equity, 514.

Of title, whether to be alleged in bill, 471.

no reference directed, 521.

WARRANT OF ATTORNEY.

Judgment under, and insolvency of debtor, 236.

WASTE.

Conditions on sale of land formerly being, 74, 75.

Strips of, presumption as to ownership of, 168.

By purchaser in possession, restrained, 118, 518.

a ground for purchase-money being paid into Court, 516.

WATER.

Rights of, title to, under Prescription Act, 184 to 188.

WATERCOURSE.

Law respecting, 184, n.; and see *Attorney-General v. Corporation of Plymouth*, 9 Beav. 67.

Title to, under Prescription Act, 184 to 188.

Existence of, with right for stranger to open, does not admit of compensation, 64, 506.

WATERWORKS COMPANY.

Agreement to sell or conveyance to, does not include mines, &c. unless named, 52, 97, 258.

WAY.

Rights of, undisclosed, 52, 54, 64, 379, 509.

title to, under Prescription Act, 184 to 188.

Necessary, obstruction of, a disturbance, 367.

WEDLOCK.

Child born in, is presumably legitimate, 169.

WEIGHTS AND MEASURES.

Statutory meaning of expressions referring to, not alterable by evidence of usage, &c., 452.

WHARF.

And jetty sold, and no title to jetty, 506.

WIDOW. *See* MARRIED WOMAN.

Settlement by, before marriage, on children by former husband, not fraudulent, 424.

WIFE. *See* MARRIED WOMAN.

Of vendor, holding deeds, not a proper party to suit for specific performance, 204.

Purchase in name of, an advancement, 437, *et seq.*

Vendor whether compellable to procure concurrence of, 498.

WILFUL.

Default, as respects liability to interest, 299.

what is, 299, n., 337, n.; *see* ACCOUNT, DEFAULT.

Refusal, &c, of statutory owners, Railway Companies do not pay costs occasioned by, 337.

WILL.

General devise in, an insufficient root of title, 141.

Copy of, should accompany abstract, when, 145.

What evidence of, required, 157.

When to be proved in Equity, 158, 164, 468.

When to be produced as negative evidence, 165, 264.

Not affecting the estate, received as evidence of intestacy, 168.

Proved, vendor must verify abstract by office copy of, 202.

Registration of, after time fixed by Statute, effect of, 319, 400.

Whether purchaser can claim copy of, on completion, 316.

Purchaser's, how affected by contract, *see* Ch. VII.

or by conveyance, 387.

WINDFALLS.

After contract belong to purchaser, 116.

WITHDRAWAL.

Of unaccepted offers, admissible, 104.

WITNESS. *See* ATTESTING WITNESS.

Signature as, its effect, 107.

WOODLAND.

Compensation for surface deficiency, on sale of, 308.

WRONGFUL.

Claim, &c., when a breach of covenants for title, 367.

YARD.

Sold with house and no title to, 64.

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